

BARRIERS TO ENDANGERED SPECIES ACT DELISTING, PART I

HEARING BEFORE THE SUBCOMMITTEE ON THE INTERIOR OF THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM HOUSE OF REPRESENTATIVES ONE HUNDRED FOURTEENTH CONGRESS SECOND SESSION

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BARRIERS TO ENDANGERED SPECIES ACT DELISTING, PART I

Wednesday, April 20, 2016

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE INTERIOR,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, D.C.

The subcommittee met, pursuant to call, at 1:07 p.m., in Room 2154, Rayburn House Office Building, Hon. Cynthia M. Lummis [chairman of the subcommittee] presiding.

Present: Representatives Lummis, Buck, Palmer, Chaffetz, Lawrence, and Plaskett.

Also Present: Representative Zinke.

Mrs. LUMMIS. The Subcommittee on the Interior will come to order.

Without objection, the chair is authorized to declare a recess at any time.

Thank you all for being here today for this meeting of the Interior Subcommittee of the Oversight and Government Reform Committee.

Thank you, Mr. Chairman, of the full committee.

Chairman Chaffetz has joined us today as well as our ranking member, Mrs. Lawrence, and we will have others join us.

We are here this afternoon to discuss barriers to the discovery of endangered species and, hopefully, how we can break those barriers down.

The Endangered Species Act was signed into law by President Nixon in 1973. Its primary goal was to prevent the extinction of imperiled plant and animal life and to recover those populations by removing or lessening threats to their survival.

Species are considered for listing primarily through a petition process. Anyone can file a petition, and the Fish and Wildlife Service has 90 days to respond. If the Service determines there's merit to the petition, they have 1 year to either list the species, determine it is not warranted to list the species, or that listing is warranted but precluded by other priorities.

According to the Fish and Wildlife Service Web site, there were 2,258 plant and animal species on the threatened or endangered species list. According to the Service's delisting report, 63 species have been removed from the endangered species list. Thirty-four have been recovered, 10 have gone extinct, and 19 species were listed in error. That's not a great track record.

Some will argue that simply spending more money will fix the problem, but even former Clinton and Obama administration Dep-

uty Interior Secretary David Hayes stated to the Environmental Law and Policy Annual Review in 2013 that “this has been fish-in-the-barrel litigation for folks, who because there’s a deadline, and we miss these deadlines, and so, we’ve been spending a huge amount of, in my mind, relatively unproductive time fending off lawsuits in this arena.”

There seems to be bipartisan consensus that changes need to be made to improve the law, which has been under siege by litigation. ESA decisions are increasingly driven by litigation, the threat of litigation, closed-door settlements, and, in some cases, the whims of Federal judges. Serial litigants flood the agency with petitions, and when the Fish and Wildlife Service predictably fails to meet rigid statutory timelines, they sue.

The Service eventually settles in court to set priorities behind closed doors with the serial litigants, and the process repeats. Such litigation does little more than benefit lawyers and diverts time and resources away from species conservation. What is needed is boots on the ground instead of briefcases in the courtroom.

Flexibility for the Service needs to be accompanied by an increased emphasis on species recovery planning as well as increased utilization of State and local stakeholders for data collection, habitat conservation, and the grunt work of protecting and ultimately recovering a species.

The gunnison sage-grouse, the lesser prairie-chicken, dunes sagebrush lizard show that States and locals have the expertise, resources, and will to lead on species conservation. Today, I hope to hear from our panel on how to better harness these voluntary conservation initiatives that I believe are critical to actually recovering species and, when we can, keep them off the list in the first place.

Our witnesses today will talk about their efforts on candidate conservation agreements, on habitat conservation plans, and on efforts to overcome serial litigation.

I welcome your input and hope we can have a productive discussion on how to improve the success rate of species recovery and delisting. Thank you.

I now recognize Mrs. Lawrence, the ranking member of the Subcommittee on the Interior, for her opening statement.

Mrs. LAWRENCE. Thank you, Madam Chair. Thank you for holding this important hearing.

American species face challenges on many fronts, including real estate development, energy exploration, and global climate change. In my own State of Michigan, there are roughly 25 federally recognized endangered or threatened species, including the Karner blue butterfly and the eastern prairie fringed orchid, both found in or around Detroit.

But I am optimistic that all of these species can be saved. That’s because the Nation’s principal statute, the Endangered Species Act, has a remarkable track record. Ninety-nine percent of the species that have qualified for its protections are still with us today.

The Endangered Species Act of 1973 was a bipartisan legislation passed by Congress and signed into law by President Nixon. The Endangered Species Act’s purpose is to conserve species identified as endangered or threatened with extinction and conserving the ecosystems on which they depend.

Some want to roll back those protections. They point to a low rate of delistings to indicate the failure of this important legislation. They complain that there is too much litigation. They support bills to sidestep the scientifically informed regulatory process.

I think it is an unfortunate point of view and ignores the reality. The reason species are listed for protection under the Endangered Species Act is the inability or unwillingness of State wildlife agencies to protect them from extinction.

I'm not saying that there cannot be differences of opinion about the status of given species. Fortunately, the Federal law requires that these opinions be informed by science and not guided by political rhetoric or self-interest.

Under this administration, the Fish and Wildlife Service has delisted 18 species, 16 due to recovery, which is success—more than any other administration since this act was enacted in 1973.

So, in conclusion, we should be celebrating the Endangered Species Act, not detracting from it. And that means funding the Fish and Wildlife Service so it can use all the tools that Congress gave it, including voluntary candidate conservation agreements with assurances and habitat conservation plans in addition to formal listings.

And inadequate funding has meant long lines and excessive delays in the agency's consideration of these various measures at protecting the endangered or threatened species. That is a shame but one that was created by Congress.

I thank our witnesses for appearing here today, and I look forward to your testimony and really want you to know that I am extremely committed to ensuring that we in America continue the leadership in protecting all endangered or threatened species.

Thank you so much.

Mrs. LUMMIS. Thank you.

I will hold the record open for 5 legislative days for any member who would like to submit a written statement.

The chair notes the presence of our colleague, Congressman Ryan Zinke of Montana.

We're delighted you're here today. Appreciate your interest in the topic and welcome your participation in this hearing.

I ask unanimous consent that Congressman Zinke be allowed to fully participate in today's hearing.

Without objection, so ordered.

We will now recognize our panel of witnesses.

I'm pleased to welcome Mr. Lowell Baier, attorney at law and environmental historian; Mr. Rob Thornton, partner at Nossaman, LLP; Mr. Joel Bousman, chairman of the Board of County Commissioners of Sublette County, Wyoming; Mr. Robert Glicksman, the J.B. and Maurice C. Shapiro Professor of Environmental Law at the George Washington University Law School; and Ms. Karen Budd-Falen, senior partner at the Budd-Falen Law Offices.

Welcome to you all.

Pursuant to committee rules, witnesses will be sworn in before they testify.

Please rise and raise your right hand.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?

Thank you. Please be seated.

Let the record reflect that the witnesses answered in the affirmative.

In order to allow time for discussion, please limit your oral testimony to 5 minutes. And thank you all for being willing to come to this hearing early. This way, we have a chance to hear from our witnesses and hopefully answer some questions before the panel gets called to votes.

In order to allow time, we'll have your entire written statement made part of the record. So if you choose to cut it short, don't be worried that your remarks will not be taken into the record.

Mr. Baier, you are recognized for 5 minutes. And welcome.

WITNESS STATEMENTS

STATEMENT OF LOWELL BAIER

Mr. BAIER. Thank you, Madam Chairman, members of the committee.

A primary incentive to litigation that's a barrier to delisting is money. Money, money, money. It's that simple. It's the reimbursement of legal fees.

Now, I first became interested in this topic after reading some of my co-witness Karen Budd-Falen's writings on the 1980 Equal Access to Justice Act, which in turn led me to a 5-year research project that resulted in my new book, just published, which is here on the dais, or on the table, entitled "Inside the Equal Access to Justice Act: Environmental Litigation and the Crippling Battle over America's Lands, Endangered Species, and Critical Habitats."

And I couldn't understand from my research, which is what got me into it, how a handful of small litigation groups masquerading under the banner of environmental stewards could wage serial litigation wars on our Federal land management agencies.

So I did what a good forensic investigator does; I followed the money trail. And it led to my finding that the citizen suit provisions in the Endangered Species Act and the 1980 Equal Access to Justice Act pay a bevy of both in-house and outside attorneys on retainer who parade under the title of, "pro bono counsel" but are, in fact, paid handsomely for their work by the U.S. Treasury. So the number-one incentive to litigation that stymies delisting is money, the reimbursement of legal fees.

Let me give you a graphic of the money trail that followed the 2011 multidistrict litigation settlement, which expires at the end of the next fiscal year, in 2017.

Now, this is a graphic that we created—can we get that up on the screen? Or is it on your monitors?

There it is. No, that's not it.

Well, this is what it's—oh, there it is. Good. Good. All right.

If you look across the top right here, right across the top of this, you'll see a bunch of boxes up there. There are eight boxes.

I'll wait for a moment for you all to get that in front of you.

All right. There are a series of boxes across the top. Each of those represents a lawsuit.

What happened is the two litigants, WildEarth Guardians and Center for Biological Diversity, in a pincer action, literally surrounded the Fish and Wildlife Service with these lawsuits in different districts throughout the United States. And so, in order to get these consolidated and dealt with in one court so their personnel and their resources weren't stretched, the Service consolidated them here in Washington.

And the court here then added, over on the left side—here, right where I'm pointing—three more cases. So now we have a total of 15 cases in front of the U.S. district court here in the District of Columbia.

And the judge asked the parties to try to settle. They did reach a settlement agreement in September of 2011, which we refer to as the multidistrict litigation settlement.

Now, you would think, folks, that at that point the case is over. It's settled, and now the Fish and Wildlife Service has a whole order of—a calendar that they set up. 1,030 species were now on their calendar. So, between 2011 and 2017, they had a calendar to follow of species that they were supposed to then make a decision on as to whether to list, delist, or not find an appropriate listing.

And what happened was they began to work their way down through the 1,030, over the calendar, and as they made decisions, these two litigants continued to then sue them because they didn't like the decision the Fish and Wildlife Service made, whether it was to list or delist—or not delist, but not list at all.

And so what's happened is—we had 15 cases consolidated, and if you look at the list on the far left, these are the challenges that they issued after September 11, each of them a separate lawsuit. And in the middle are other lawsuits that were generated by the settlement agreement, and on the far right, more lawsuits.

So what the settlement did is nothing but generate a whole series of new lawsuits. And, you know, I scratch my head. And what's driving this? The money trail. That's what the money trail led to.

I can see that I'm about out of time, Madam Chairman.

This litigation has undermined the work of Dan Ashe and the Service, who were promoting cooperative conservation projects with the States and with the private sector that put money on the ground, boots-on-the-ground money, and not money into lawyers' pockets. And this trail has demonstrated that their hard work to do cooperative conservation work is being undermined by lawsuits.

I have more, Madam Chairman.

Mrs. LUMMIS. Thank you, Mr. Baier. I gave you a few extra seconds—

Mr. BAIER. Oh, thank you.

Mrs. LUMMIS. —because it took me a while to find the exhibit and get on track. So—

Mr. BAIER. Well, thank you for your indulgence.

Mrs. LUMMIS. Yeah, I appreciate your preparing the exhibit.

Mr. BAIER. Should I continue then?

Mrs. LUMMIS. You know, I think that we'll ask you questions.

Mr. BAIER. Okay.

[Prepared statement of Mr. Baier follows:]

Testimony of Lowell E. Baier

**Before the Subcommittee on Interior of the
Committee on Oversight and Government Reform,
United States House of Representatives**

“Barriers to Endangered Species Act Delisting, Part I”

April 20, 2016

Ms. Chairman and Members of the Committee, thank you for the opportunity to testify today on the challenges posed by litigation under the Endangered Species Act, and particularly on the impact of litigation on delisting. My name is Lowell E. Baier, I am an attorney in Bethesda, Maryland, and a lifelong conservationist and wildlife advocate. Thank you for giving me the opportunity to testify on this important subject.

The Endangered Species Act is often called the most important environmental law ever passed, and it is called this for both good and bad reasons. It has prevented extinctions, conserved wild landscapes, and helped perpetuate the environmental awakening of the 1960's and 1970's. It has also had undeniable negative impacts on humans, reduced the number of working landscapes in this country, and increased tensions between local and national, state and federal, and public and private interests. The guiding star of the Endangered Species Act, the rudder by which we are supposed to navigate these treacherous waters, is the expert, professional decision making of federal agencies, principally the U.S. Fish and Wildlife Service and National Marine Fisheries Service but also other land management and permit-issuing agencies.

The Obama Administration has shown great leadership in forging productive compromises, greatly expanding the use of prelisting conservation, keeping people on the land and the land supporting them and our national economy as well as imperiled species, and putting in long, painstaking hours in negotiation and coalition building. But their hands are tied by an act that is too strict in some areas and too vague in others. One of the areas where it is strict is in its citizen suit provision, which has made federal courts a venue where extreme organizations, special interests outside of the mainstream occupied by groups such as the National Wildlife Federation and the Nature Conservancy, can twist the Endangered Species Act and bend the federal government to their will. Part of their agenda is to always increase the number of species and amount of land protected under the Endangered Species Act, and so they have used the courts to oppose delisting of recovered species.

Litigation Stymies Delisting

The delisting controversy today is centered on the gray wolf, *Canis lupus*, particularly its populations in the Northern Rocky Mountains and Western Great Lakes, and the grizzly bear, *Ursus arctos horribilis*, and its population around Yellowstone National Park. These iconic species were among the first listed, and they have been the subject of intense focus and effort over a period of many decades. Since 2003, the Fish and Wildlife Service has been attempting to downlist or delist these species. For a visual representation of the difficulty of this undertaking, see figure 1 on page 9.

Northern Rocky Mountain Gray Wolf

In the case of the Northern Rocky Mountain population of gray wolf, reintroduced beginning in 1995, the official 1987 *Northern Rocky Mountain Recovery Plan* provided that the wolf would be recovered when Idaho, Montana, and Wyoming had a combined total of 300 wolves including 30 breeding pairs for three successive years. This goal was achieved in 2002 and has since been exceeded continuously. As of the Fish and Wildlife Service's December 31, 2015 report, there were at least 1,704 wolves in 282 packs with 95 breeding pairs.

For over a decade, the Fish and Wildlife Service has recognized that the population is recovered and should be delisted, and it has taken steps in that direction numerous times. At every turn, the process has been halted by litigation. In 2003, the Service first tried to establish distinct population segments for the Western (Northern Rocky Mountain) and Eastern (Western Great Lakes) populations of wolf, and downlist them from endangered to threatened. Two separate lawsuits invalidated the delisting rule. *Defenders of Wildlife v. Norton*, 354 F.Supp.2d 1156 (D. Or. 2005) and *National Wildlife Federation v. Norton*, 386 F.Supp.2d 553 (D. Vt. 2005).

The Service then initiated a series of rulemakings designating and delisting a Northern Rocky Mountain distinct population segment, an effort that continues to this day. The February 27, 2008 delisting of the population was reversed on July 18, 2008. *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160 (D. Mont. 2008). The April 2, 2009 delisting of the population in Montana and Idaho was reversed on August 10, 2010. *Defenders of Wildlife v. Salazar*, 729 F.Supp.2d 1207 (D. Mont. 2010). Finally, the September 10, 2012 delisting of the population in Wyoming was reversed on September 23, 2014. *Defenders of Wildlife v. Jewell*, No. 12-1833 (D. D.C. 2014). In the intervening period, Congress acted by including in the Department of Defense and Full-Year Continuing Appropriations Act of 2011 a requirement that the Fish and Wildlife Service reissue the vacated 2009 rule and prohibited further judicial review of that rule. Even this act of Congress was subjected to not one but two lawsuits, both of which failed. *Alliance for the Wild Rockies v. Salazar*, No. 11-70 (D. Mont. 2011) and *Center for Biological Diversity v. Salazar*, No. 11-71 (D. Mont. 2011).

All told, the four attempts by the Service to downlist or delist the Northern Rocky Mountain wolf and the 2011 congressional action delisting the wolf in Montana and Idaho attracted seven individual lawsuits, five of them successful. Over the years, there have also been innumerable additional suits dealing with wolf management issues beyond the scope of this testimony. But they are significant because most of them were enabled by the fact that the wolf remained listed.

Western Great Lakes Gray Wolf

The story in the Western Great Lakes has been much the same. The 1992 recovery plan called for a population of 1200-1400 in Minnesota and a separate population of 100-200 outside of Minnesota, sustained for five years. These goals were met in 2001. The latest, 2015 population estimate is 2,221 in Minnesota and a total of 1,385 individuals in two separate populations outside Minnesota. Following the two 2005 lawsuits over the 2003 downlisting of the wolf, the Fish and Wildlife Service made three separate attempts to designate and delist a Western Great Lakes Distinct Population Segment, all stymied by litigation. The February 8, 2007 delisting of the population was reversed on September 29, 2008. *Humane Society of the United States v. Kempthorne*, 579 F. Supp. 2d 7 (D. D.C. 2008). The April 2, 2009 delisting of the population was reversed by settlement on July 2, 2009, because the Service acknowledged

that it had failed to comply with notice-and-comment procedures. *United States v. Salazar*, No. 09-1092 (D. D.C. 2009). Finally, the December 28, 2011 delisting was reversed on December 19, 2014. *Humane Society of the United States v. Jewell*, No. 13-186 (D. D.C. 2014).

Yellowstone Grizzly Bear

The Yellowstone population of the grizzly bear has recently joined the gray wolf in recovered but not delisted limbo. The 1993 recovery plan called for 15 adult females with cubs occupying 16 of 18 bear management units with annual mortality not exceeding 4% of the population. These goals were met in 1998. The recovery criteria were revised in 2007 to call for at least 500 bears including 48 females with cubs in 16 of 18 bear management units with an approximately stable population since 2002. All of these criteria were met by 2004. As of 2014, there were estimated to be around 750 individual bears in the population, give or take 100.

The Fish and Wildlife Service first delisted this population on March 29, 2007, but this was reversed on September 21, 2009. *Greater Yellowstone Coalition v. Servheen*, 672 F.Supp.2d 1105 (D. Mont. 2009). Just last month, on March 11, 2016, the Service published a proposed rule that indicates that it is again considering delisting the Yellowstone population of the grizzly bear. If and when that rule becomes final, more litigation is sure to follow.

Delisting Provides Another Venue for Litigation and Relitigation of ESA Issues

Like all mandatory duties of the Secretary under Section 4 of the Endangered Species Act, delisting is subject to citizen suits in which private citizens and non-governmental organizations may file suit to either compel or prevent agency action. These citizen suits were intended to provide a check on maladministration of the Endangered Species Act, for example by intervening when the Service makes a political decision to not list or to delist a species in order to favor a special interest. Ironically, the shoe is now on the other foot and citizen suits are used to promote special interests by intervening when the Service makes a non-political, scientific decision to not list or to delist a species.

Many aspects of the Endangered Species Act are inadequately defined or outdated (the act has not been reauthorized by Congress since 1988), and this creates a fluid decision space where scientific decisions properly made by the Services rest on unclear statutory ground and are therefore subject to judicial attack. These issues are common in Endangered Species Act litigation generally, and they are applicable to delisting decisions as well as listing decisions, although listing decisions are more commonly litigated, largely because listings are so much more common than delistings.

The Endangered Species Act Favors Listing Over Delisting

In a decision that was understandable in 1973 but has proven problematic in the intervening years, Congress focused most of its work on the Endangered Species Act on the process of listing species and protecting listed species. Section 4 of the act lays out a detailed process and 5-factor test for listing species, but simply says the same factors should be evaluated in delisting, and it charges the Secretary with creating recovery plans unless such a plan will not promote the conservation of the species while broadly sketching out loose criteria for recovery plans. There is no guidance given as to how a recovery plan should be written or who should participate in the process. The result of this has been that many recovery plans are missing, incomplete, or do not map well onto the 5-factor listing test.

Accordingly, recovery plans are easy targets of opportunity for litigants, who take complex questions that often involve cutting edge science and put them in a courtroom and have a federal judge adjudicate them. The Endangered Species Act should be amended to provide a more consistent framework for delisting plans and some certainty that recovered species will be delisted – one possibility would be to tie delisting to achievement of recovery plan goals rather than the 5 listing factors. This would create an incentive for private landowners to work on recovering species, because the recovery plan would provide fixed goalposts that could not be moved after the fact by a lawsuit.

In addition, Congress should take steps to enable efficient implementation of recovery activities. For example, management actions with long-term benefits for species are often foregone because the Endangered Species Act is overly precautionary, and the potential take of an individual can override future benefits to an entire population. Management actions carried out in accordance with approved recovery plans should be exempt from Section 7 consultation and incidental take permits. Recovery plans themselves would still be subject to public scrutiny and review, so exempting actions under them from consultation and incidental take permits would simply remove redundant bureaucratic oversight and opportunities for destructive litigation.

Deadline Suits Undermine Science and Prevent Delisting

Another way in which the Endangered Species Act favors listing over delisting is its strict Section 4 deadlines for responding to listing petitions. The Endangered Species Act is devoid of criteria to guide the Fish and Wildlife Service in the prioritization of species listing petitions and species delistings, although regulations implementing the candidate species list provide criteria for prioritizing the conservation and evaluation of candidate species. In contrast, the requirement that the agency must respond to petitions within 90 days and complete status determinations for petitioned species within 12 months is enforceable by citizen suit. The effect of these impractically short deadlines is a barrage of lawsuits that whiplash the Service from one species listing to another in an ad hoc, unscientific way. Delisting can also be sought by petition but in practice is a much more measured, considered process. As such, it is not a statutory priority and too easily falls by the wayside. In addition, the ongoing gray wolf and grizzly bear litigation situations are powerful disincentives for any agency official considering another delisting.

Significant Portion of Its Range

An example of the effect of undefined terms on implementation of the Endangered Species Act comes from the phrase “a significant portion of its range” in the act’s definitions of endangered and threatened species. At issue has been whether a significant portion of a species’ range refers to its historic range or its present range. The two 2005 wolf cases turned, in part, on the courts holding that the Fish and Wildlife Service had impermissibly defined a significant portion of the gray wolf’s range to be coterminous with its extent range. In the Yellowstone bear case, on the other hand, the court held that the Service’s interpretation of a significant portion of its range was acceptable, even as it overturned the delisting on other grounds, which will be discussed shortly. This holding came despite the fact that the Service again defined a significant portion of its range to refer to current range, because in this case the Service much more rigorously explained the science behind its definition. Perhaps encouraged by this holding, the Obama Administration codified its interpretation in a July 1, 2014 rulemaking. That rulemaking, which is intended to be a basis for future listing decisions and by extension future non-listing

decisions and future delisting decisions, is in doubt due to a 2014 lawsuit that remains pending. *Center for Biological Diversity v. Jewell*, No. 14-2506 (D. Ariz. 2014). A firm, statutory definition for a significant portion of its range would put future listing and delisting determinations on stronger legal footing.

Distinct Population Segments

An issue closely related to a significant portion of its range is the recognition of distinct population segments, which was the driving force behind most of the wolf cases, and a source of endless frustration to states and the Fish and Wildlife Service. Prior to the 1996 Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, species were only listed as threatened or endangered throughout their range. This designation is overly broad for formerly wide-ranging predators such as wolves that now exist in isolated, but thriving, populations. Wolves simply are not going to be recovered nationwide, nor should they be. They provide great ecosystem services in the comparatively wild landscapes where they remain, and by any rational measure they are successfully recovered.

But federal courts have held that the Service can only delist what it listed, that is to say that a new listable entity such as a distinct population segment cannot be created for the purpose of delisting that entity. The policy concern underlying this, that agencies might delist species that are not yet recovered by declaring all extant populations individually recovered, is reasonable, but courts have gone too far in establishing an absolute bar. In the cases of wolves, there is a broad consensus that the two populations discussed above are actually recovered and sustainable and should be delisted. The Fish and Wildlife Service clearly believes that they are recovered and should be delisted, as evidence by its repeated attempts to delist them across two administrations. As some point, the special interests that are determined to keep this species listed should yield to the expert judgment and publically vetted process of the agencies Congress charged with carrying out the Endangered Species Act.

Adequacy of Regulatory Mechanisms

Another issue, common to the 2012 delisting of the wolf in Wyoming and the 2007 delisting of the Yellowstone grizzly bear, is dissatisfaction with the regulatory mechanisms in place to protect a delisted species. In each case, a federal court held that protections were inadequate despite the presence of strong, state-led programs that had been vetted and approved by the Fish and Wildlife Service. Although there is a role for courts to play in making sure that agencies follow the law, in these cases the Fish and Wildlife Service did not receive the deference it was due. Seizing on these precedents, many of the same special interest litigators involved in the wolf and bear cases have recently filed lawsuits against the Fish and Wildlife Service for not listing the greater sage grouse and for listing the lesser prairie chicken as threatened rather than endangered. Both of these species are benefitting from unprecedented conservation efforts coordinated by states, carried out by state and private entities, vetted by the Fish and Wildlife Service, and funded by numerous stakeholders including the Natural Resources Conservation Service in the Department of Agriculture. But much of the regulatory toolbox used to conserve these and other imperiled species, including Candidate Conservation Agreements, Candidate Conservation Agreements with Assurances, Safe Harbor Agreements, and State Wildlife Action Plans, did not exist when the Endangered Species Act was last reauthorized. The Fish and Wildlife Service is thus forced to defend its reliance on these programs through regulation, with mixed results. It lost the wolf and bear cases, and while it has

mostly won a number of cases relating to grouse, chicken, and other species, a number of challenges are still pending. As prelisting conservation becomes more robust and more widely embraced, more and more decisions not to list are going to rest in part on the adequacy of regulatory mechanisms protecting the species, and the wolf and bear delisting cases are an ominous warning.

Species Listed in Error

No discussion of delisting would be complete without mentioning species listed in error. According to the Fish and Wildlife Service, 63 species have been delisted, including 34 recovered species, 10 extinct species, and 19 species listed in error. Some observers have suggested that as many as 10 of the species described as recovered may actually have been listed in error as well. Over one third and perhaps close to half of all formerly listed species still extant were listed in error. Species listed in error, including species listed due to inadequate surveys at the time of listing, have remained listed for long periods of time, in some cases for over 30 years. These missteps have consumed agency resources and eroded public confidence, and because these listings trigger Endangered Species Act protections, they provide further openings for mischievous litigation. An improved system of delisting should include expedited consideration for species listed in error.

Federal Agencies, Not Special Interest Litigants, Serve the Best Interests of Species

In years past, controversies over endangered species have been perceived as pitting Democrats against Republicans, executive agencies against Congress, the federal government against state governments, and government against landowners. This is no longer the case. Incredible progress has been made in the last decade, and a shared desire for and commitment to a better, less costly, more scientific endangered species program is shared by Congress, executive agencies, state governments, landowners, private citizens, and most environmental groups.

The outlier is a small set of fiercely dedicated and brutally effective special interest litigants that have developed the capacity to serialize endangered species litigation and grind the entire endangered species program to a halt. Their effectiveness is best illustrated by a 2011 settlement between two of them, the Center for Biological Diversity and WildEarth Guardians, and the Fish and Wildlife Service. These two groups had spent the better part of a decade inundating the Service with deadline litigation that diverted resources from actual conservation and sapped agency morale, and finally they entered into a massive settlement that established 1,559 judicially enforceable deadlines covering 1,030 species, subspecies, and populations, as well as outlining the entire Fish and Wildlife Service listing agenda for five years.

The Fish and Wildlife Service entered into this settlement willingly, in order to reduce the number of listing petitions and lawsuits it faced, but in the four and a half years since the settlement was finalized, 33 separate lawsuits have been filed against the Service and other federal agencies by the two groups involved in the settlement specifically regarding species covered by the settlement, and a further 7 cases have been filed by other groups attacking the settlement. These cases are documented in figure 2 on page 10 and following. Other groups have also been filing lawsuits during this time, of course. But what is most surprising is that Fish and Wildlife Service officials readily say that the settlement is a success and has dramatically reduced the amount of litigation they face. This gives us an idea of the sheer volume of litigation they have been subjected to. The settlement expires at the end of this fiscal year, at which time

the Center for Biological Diversity and WildEarth Guardians will again be free to file as many lawsuits against the Service as they desire.

These litigators and others like them bring this incredible capacity for litigation to bear when species are being delisted. A favorite tactic is delaying delisting, as seen in the wolf and bear examples discussed above. Even when species are ultimately delisted, litigation can drag out the process and waste agency resources. For example, the Virginia northern flying squirrel was listed in 1985 when only 10 individuals were known to be alive in the wild. Surveys in the early 2000's found over 1,000 individuals and suggested a healthy population across 80% of the species' range, leading to its delisting in 2008. Even though the scientific data on this species was clear, a lawsuit returned the species to listed status until 2013. *Friends of Blackwater v. Salazar*, 772 F.Supp.2d 232 (D. D.C. 2011) (reversed on appeal: *Friends of Blackwater v. Salazar*, 691 F.3d 428 (D.C. Cir. 2012)).

Another tactic used when a species is being delisted is to push for the separate listing of a related subspecies or population, undercutting the on the ground impact of the broader delisting. One example is the iconic American bald eagle, probably our most famous recovered species. The bald eagle was downlisted from endangered to threatened in 1995 and delisted in 2007. Beginning in 2004, the Center for Biological Diversity and other groups launched a series of petitions and lawsuits to have the Sonoran desert population of the bald eagle listed as an endangered distinct population segment. The Fish and Wildlife Service agreed to consider it but found that even as a distinct population segment the so-called "desert eagle" did not warrant listing. Another example of this practice comes once again from the the gray wolf. Starting in 2009, the Center for Biological Diversity petitioned the Fish and Wildlife Service to list the Mexican gray wolf, a non-essential experimental population of gray wolf, as an endangered subspecies of gray wolf. This effort succeeded in 2015.

As these cases show, the primary instigators of endangered species litigation are opposed to any and all delisting on its face, regardless of the scientific merits. Litigation under the Endangered Species Act provides them with a weapon that they can wield without fear of reprisal. In this they are totally outside of the mainstream, not just of American society, but of some of the most dedicated environmental groups in the nation, groups like the National Wildlife Federation (which intervened in support of the government in several of the wolf delisting cases) and the Nature Conservancy (which invests hundreds of millions of dollars into conservation). That these mainstream groups support and cooperate with the Fish and Wildlife Service is evidence that that Service is doing something right. When the Service makes a species status determination or when these groups send their biologists into the field, they are carrying out real conservation. In contrast, when fringe litigants file lawsuits that delay important conservation actions and waste agency resources, they are impeding conservation.

The Credibility and Future of the Endangered Species Act Are At Stake

These remarks began with the observation that the Endangered Species Act is often called the most important environmental law ever passed. What everyone needs to realize, what many Members of this Committee are undoubtedly hearing in their districts, is that success is grounded in good governance, and good governance is based on compromise. Extreme litigants have made it clear that they will not compromise, and as currently written and interpreted by courts, the Endangered Species Act is a tool that they can use to undermine compromise. If we cannot compromise on difficult issues such as endangered species, if our public discourse continues to become more polarized, we will find ourselves on a path to lawlessness as the

Endangered Species Act ultimately becomes unenforceable. At that point, we will lose all of the good things that this magnificent law has accomplished. And if we cannot compromise on delisting, if we cannot come together, leave the courthouse, and celebrate as we watch bald eagles soar and hear wolves howling beyond our campfires, then where can we compromise?

Thank you for the opportunity to testify today.

Figure 1

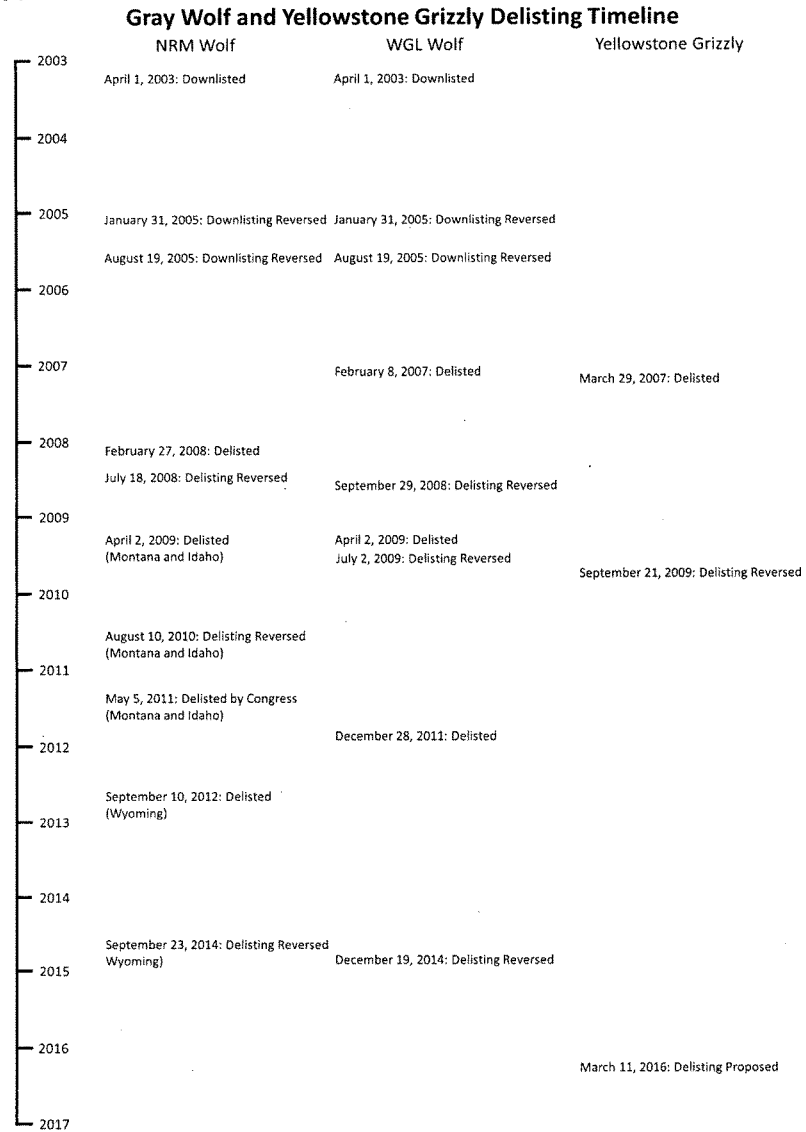


Figure 2

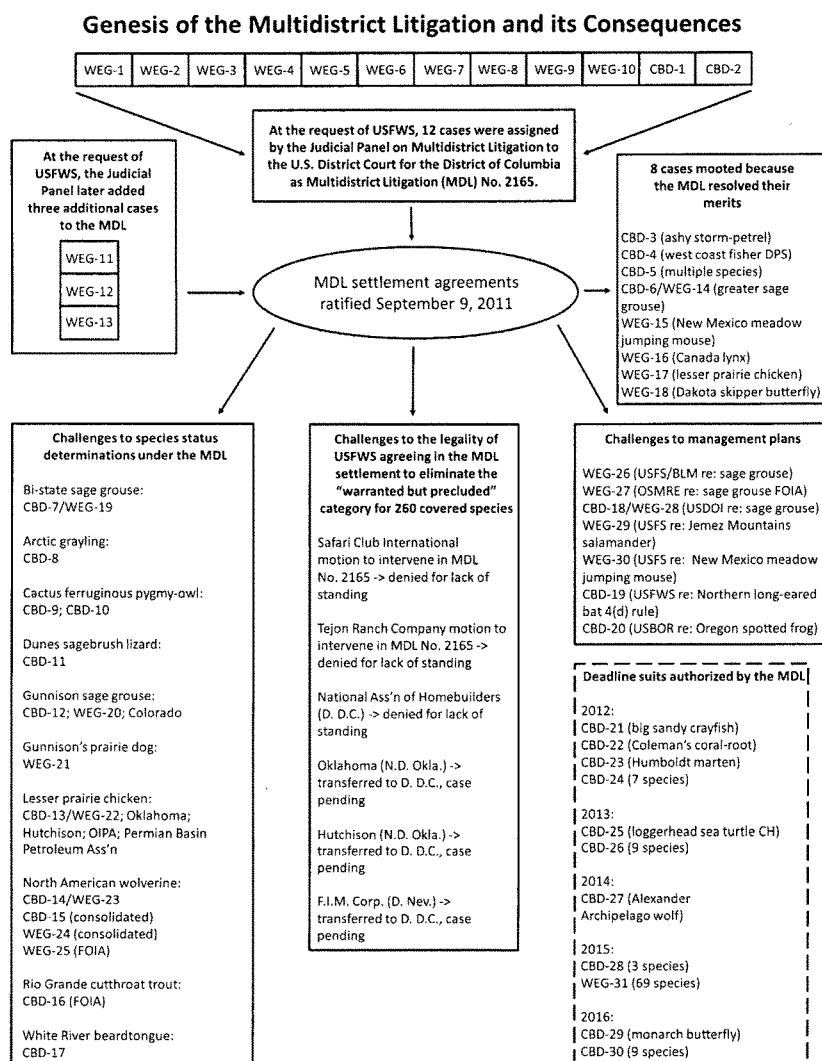


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Mrs. LUMMIS. So, with that, Mr. Thornton, you are recognized for 5 minutes.

STATEMENT OF ROBERT THORNTON

Mr. THORNTON. Madam Chair, members of the committee, it's a pleasure to be with you today. I will summarize my testimony.

I'm a partner in the Nossaman law firm, but I'm testifying as an individual, not on behalf of the firm or its clients. But the firm is an affiliate of the California association that's affiliated with the National Association of Home Builders.

My testimony is based on my three decades of experience representing both plaintiffs and defendants in Endangered Species Act matters and focuses particularly on efforts to delist two species, the coastal California gnatcatcher and the valley elderberry longhorn beetle. I've left with staff some pictures because it's always nice to have pictures to put with descriptions.

Our view is that the best available science indicates that neither species should be listed because neither are endangered or threatened and that the Service's consideration of the delisting petitions for these two species exemplifies the barriers to delisting even in circumstances where published and peer-reviewed studies and the Service's own status review documenting the original grounds for listing are wrong.

I'll focus on the California gnatcatcher. The gnatcatcher is a species—as a species, is a common Mexican bird that's found from southern California to the tip of Baja. You have the range map there showing the range of the gnatcatcher. There are likely several million gnatcatchers in Mexico. The coastal California gnatcatcher, which is the listed subspecies, is found from southern California to El Rosario and Baja, Mexico.

The subspecies designation is important because the petitioner for the listing, Dr. Jonathan Atwood, testified that, “no credible scientist would claim or has claimed that California gnatcatchers as a species are endangered or threatened throughout their range.”

Using 19th-century ornithology, the Service listed the coastal gnatcatcher as a distinct subspecies in 1993 based on two crude measurements of two physical features, the brightness of breast feathers and the purity of back feathers. And they took the position that the differences in these two physical features constituted sufficient genetic distinctiveness to justify the listing of the subspecies.

During the extensive delisting or listing debate in the 1990s, several nationally recognized scientists testified that the data did not support this conclusion, in part because the measurements of the two physical characteristics were based on measurements of museum specimens, some of which had been sitting in museum desk drawers for 100 years. After a Federal court initially invalidated the listing, the Service relisted the species, relying on the, what they call, morphological data.

Now, over the next 7 years, a group of nationally recognized scientists conducted genetic analysis of mitochondrial DNA. Mitochondrial DNA is the DNA that we all inherit from our mothers. And this was, at the time, the state-of-the-art method for analyzing genetic differences among animals.

Those studies, published in—a peer-reviewed study published in the very well-known journal *Conservation Biology* concluded that there's no material genetic differences between any gnatcatchers throughout the entire range, its range from southern California to the tip of Baja.

In 2010, a group of landowners petitioned the Fish and Wildlife Service to delist the gnatcatcher based on that study. That study—that delisting petition was denied. Essentially, the Service said that the mitochondrial DNA evidence was not sufficient and said that what was required was a nuclear DNA study.

The scientists went back to the lab and in 2013 published another study, this time based on nuclear DNA, reconfirming the results of the prior study, that there is no significant genetic differences and that the listing of the subspecies is not warranted.

On behalf of several organizations, we filed a petition to delist. The final decision on that delisting petition is still pending. But we're concerned for, among other reasons, we filed a Freedom of Information Act to obtain documents regarding the Service's review of the delisting petition, and the Service is refusing to provide us any substantive documents regarding their external review of the delisting petition—that is, their engagement of an outside contractor to review the delisting petition. And they're even refusing to disclose the identity of the individuals conducting the review, which we believe is a violation of the Endangered Species Act.

Thank you, Madam Chair and members of the committee.

[prepared statement of Mr. Thornton follows:]

**Testimony of
Robert Thornton**

**Before
Committee on Oversight and Government Reform
Subcommittee on the Interior**

Barriers to Endangered Species Act Delisting

April 20, 2016

Background.

My name is Robert Thornton. I am a partner in the Irvine, California office of the Nossaman law firm.¹ For over thirty-five years, I have represented both plaintiffs and defendants in Endangered Species Act litigation, and have both challenged and defended rules adopted by the U.S. Fish and Wildlife Service and NOAA Fisheries to implement the Endangered Species Act. I have assisted clients in preparing and implementing over a dozen habitat conservation plans approved by the Fish and Wildlife and NOAA Fisheries. These conservation plans have conserved hundreds of thousands of acres of habitat for endangered and threatened species and other species of concern. I was counsel to the House Fisheries and Wildlife Conservation Subcommittee during the Congressional consideration of the 1978 and 1979 Endangered Species Act amendments.

¹ My testimony is provided as an individual and not on behalf of Nossaman LLP or any of its clients.

My testimony is based on by experience working on several matters concerning the listing and delisting of species under the ESA. In particular, my testimony focuses on my experience concerning the listing and delisting of two subspecies – the coastal California gnatcatcher – a bird found from Southern California to the southern end of the Baja Peninsula in Mexico, and the valley elderberry longhorn beetle – an insect that is endemic to the Central Valley of California.

Summary.

The best scientific data available indicates that neither species qualifies for listing under the ESA because they are not threatened or endangered. The record of the Fish and Wildlife Service’s consideration of delisting petitions for these two subspecies demonstrate the significant institutional resistance to delisting species within the Fish and Wildlife Service, and that the Service is not applying consistent and transparent standards to listing and delisting decisions.

The purpose of the ESA is to protect genetically unique or evolutionarily distinct life forms. It does this by requiring that listing decisions be based on the “best scientific . . . data available” and by requiring that a species or subspecies be threatened or endangered “throughout all of a significant portion of its range.” The failure to use the best scientific data available in listing decisions can only serve to engender cynicism that listing decisions are a product of ideological and regulatory motives rather than the best available scientific data. It also diverts scarce private and public resources from more important conservation challenges.

The Petition goes to the heart of the ESA because an objective, science-based listing process is central to the statute’s integrity. Transparency, in turn, is an essential component of the “best science” requirement. The Service cannot comply with the ESA requirement to base listing decisions on the “best scientific data available” while, at the same time, withholding documents generated by an outside committee consultants that include facts necessarily required of a full, fair and transparent evaluation of the Petition.

1993 Decision to List the Coastal California Gnatcatcher As A Threatened Species.

Poliophtila californica (commonly referred to as the “California gnatcatcher”) is a species of song bird that extends from the southern tip of the Baja peninsula in Mexico north to Ventura County (north of Los Angeles) in California. It is common in central and southern Baja California and throughout Baja California Sur, and less common in southern California.

The Service listed the coastal California gnatcatcher as a threatened subspecies in 1993 based on the analysis of morphological data (physical characteristics such as degree of brightness of breast feathers, purity of back feathers). The petitioner for the listing, Dr. Jonathan Atwood argued at the time that that there are three valid subspecies of *Poliophtila californica*. At the time of the debate over the listing, Dr. Atwood acknowledged that the subspecies designation for the northernmost subspecies -- coastal California gnatcatcher -- was central to the listing decision because “[n]o credible scientist would claim or has claimed that California gnatcatchers as a species are endangered or threatened throughout their entire range.” (Testimony to California Fish and Game Commission, August 31, 1991.) This statement remains correct today.

During the listing process, Dr. Barrowclough of the American Museum of Natural History and other scientists testified that the morphological data reported by Dr. Atwood did not support a conclusion that coastal California gnatcatcher was a distinct subspecies. These scientists suggested that a genetic study should be conducted to resolve the serious questions that had been raised concerning the morphological data. The scientists testified that any morphological differences between gnatcatchers in the northern, central and southern portions of the gnatcatcher range could be explained by the aged condition of specimens (feather coloration fades over time, such that two groups of individuals sampled from the same place 50 year apart would appear to differ), technical problems with plumage color measuring devices, and environmental, not genetic, causes of color differences in feathers.

Relying on the disputed morphological data, the Service listed the coastal California gnatcatcher, but acknowledged that the data was not definitive, and suggested that additional research might support a different conclusion.

2000 – First Gnatcatcher Genetic Study Published.

Taking a cue from the Service's acknowledgement of the need for a genetic analysis, Dr. Zink, Dr. Barrowclough and other scientists (including Dr. Atwood) spearheaded a new study that would focus not on gnatcatcher morphology but rather on the bird's mitochondrial DNA (mtDNA) – dna that is past by mothers to their offspring. Robert M. Zink, *et al.*, *Genetics, Taxonomy, and Conservation of the Threatened California Gnatcatcher*, 14 *Conservation Biology* 1394 (2000) [hereinafter Zink (2000)] (Exh. C to Delisting Petition (attached)). Mitochondrial dna analysis leaves substantially less room for guesswork, judgment, and human error than morphological analysis standing alone. For example, measuring small body parts is prone to measurement error, which if not accounted for statistically, seriously undermines morphological studies. In the past three decades, thousands of mtDNA studies have been published and applied to conservation questions.

Zink et al.'s 2000 study (in which Dr. Atwood was a co-author) found *no* abrupt change in gnatcatcher mtDNA characters at the purported southern limit of the range of the coastal California gnatcatcher at approximately El Rosario in Baja, Mexico. Instead, the genetic change was gradual. *See* Zink (2000), *supra*, at 1401-02. Consequently, the study concluded that there is no mtDNA basis to support a subspecies classification for the California gnatcatcher. *Id.* at 1402.

Zink et al. 2000 concluded, on the basis of analysis of mitochondrial DNA studies, that no genetic distinction exists between the southern California populations of *Polioptila californica* and the flourishing *Polioptila californica* populations found throughout central and southern Baja California and throughout all of Baja California Sur.

Service Denial of 2010 De-Listing Petition.

Based on the 2000 Zink et. al. genetic study and other new scientific data generated after the gnatcatcher listing decision, in 2010, a coalition of property owners and other groups petitioned the Service in 2010 to delist the coastal California gnatcatcher.

On October 26, 2011, the Service denied the petition to delist *coastal California gnatcatcher*. 76 Fed.Reg. 66,255 (Oct. 26, 2011). The Service determined that the Zink analysis, although probative, was not decisive. *See id.* at 66,258. The Service suggested that mitochondrial DNA analysis, standing alone, is insufficient to overturn the gnatcatcher's subspecies classification, and that a **nuclear** DNA analysis should be conducted. *Id.* The Service stated that nuclear genes not mtDNA, should have priority in determining avian species delimitation.

In summary, the Service elected to continue to rely on measurement of morphological characteristics collected from museum specimens (some of which were 100 years old) despite (1) the availability of a mitochondrial DNA concluding that there were no distinct subspecies of *Poliophtila californica*, and (2) Dr. Atwood's acknowledgment that he had "serious doubts" about the accuracy of several of the measurements that were key to the delineation of coastal California gnatcatcher as a subspecies with a southern range limit at 30 degrees N in Baja, Mexico. The conclusion that the Service would not acknowledge mitochondrial DNA as the best scientific data was particularly noteworthy given the Service's and NOAA Fisheries' prior reliance on mtDNA in other regulatory decisions under the ESA. On more than 80 occasions the Service or NOAA Fisheries has relied on mtDNA evidence to make listing determinations under the ESA. See, Exh. D to Delisting Petition. *See* 76 Fed. Reg. at 66,255.

2013 – Second Genetic Study Confirms That the Coastal California Gnatcatcher Is Not A Genetically Distinct Subspecies.

Dr. Zink, Dr. Barrowclough and others continued their analysis of gnatcatcher genetics – this time analyzing nuclear dna as suggested by the Service in its decision denying the delisting petition. The new genetic analysis using eight different nuclear dna. The 2013 published and peer reviewed paper regarding the new genetic study concluded that “[a]nalysis of the nuclear loci . . . identified no geographic groupings that corresponded with any previously suggested subspecies, nor any other significant evolutionary divisions.” *Zink et. al.* at 453. The study concluded that “the California Gnatcatcher is not divisible into discrete, listable units.” *Id.* at 456. In other words, the coastal California gnatcatcher does not qualify as a threatened subspecies because gnatcatchers in Southern California and northern Baja, Mexico are not genetically distinct from the missions of gnatcatchers in central and southern Baja, Mexico.

Zink et al. (2013) presented an important test of the ESA command that the Service use the best scientific data available in listing determinations. In rejecting the 2010 petition and the Zink et al. (2000) mtDNA study on which the petition was based, the Service suggested that the mtDNA evidence reported in Zink et al. (2000) needed to be supplemented with an analysis of nuclear genes. Zink et al. (2013) provides precisely the data set that the Service acknowledged “should have priority” in avian taxonomy.

The extensive scientific controversy and disagreement over the use of gnatcatcher morphology to list coastal California gnatcatcher as a threatened subspecies vividly illustrates the problems associated with the Service’s continued reliance on analysis of gnatcatcher morphology. This is particularly the case where a robust analysis of both mtDNA and nuclear DNA exists to evaluate directly genetic differences among gnatcatcher populations. In fact, the reanalysis of morphological data, mtDNA data, nuclear gene data, and ecological niche modeling (Zink et al. 2013) are remarkably consistent in their unified support of the lack of subspecies in the California gnatcatcher. Given the dramatic advances in genetic analysis in the last two decades, it is no longer legally or scientifically defensible for the Service to continue to rely on measurements of such characteristics as brightness of breast feathers and purity of back feathers from

differently aged museum specimens to determine whether coastal California gnatcatcher is a valid subspecies. The best available data agree that the California gnatcatcher not divisible into discrete, listable units, but instead is a single historical entity throughout its geographic range.

2014 – Service Finding That De-Listing “May Be Warranted”

In 2014, several organizations filed a second petition to delist the gnatcatcher based on the new gnatcatcher genetic study published by Dr. Zink and his colleagues. My firm represents two of the petitioners regarding the petition. In December 2014 the Fish and Wildlife Service made a “90-day finding” that the delisting of the coastal California gnatcatcher may be warranted. The deadline for the Service to determine whether delisting the gnatcatcher is warranted, and to determine whether to propose a rule to delist the gnatcatcher expired in July 2015. To date, the Service as not made the “12-month finding” required by the ESA whether the de-listing is warranted..

Service Refusal to Provide Records Regarding Review of Delisting Petition.

After the Service missed the deadline for the 12 month finding on the delisting petition, we learned that the Service had hired an outside contractor organize a committee of scientists to review the evidence regarding the subspecies delineation for the coastal California gnatcatcher. In September 2015, I filed a Freedom of Information Act (“FOIA”) request that the Service provide us with certain documents related to the Service’s review of the petition to delist the coastal California gnatcatcher.² The request included all records relating to any working group, committee, advisory group or any other groups or individuals outside of the U.S. Fish and Wildlife Service . . . regarding the taxonomy of the coastal California gnatcatcher, or the matters described in paragraph (1)(a) through 1(e)” of the FOIA Request.”

² The FOIA request is described in greater detail in the attached appeal of the Service's response to the FOIA request.

FOIA is based on the theory that “in order for democracy to function properly, citizens must have access to government information.” *Pacific Fisheries Inc. v. United States*, 539 F.3d 1143, 1147 (9th Cir. 2008). The “core purpose” of FOIA is to inform citizens about “what their government is up to.” *Dep’t of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 773, 775 (1989). Unless a document falls within one of FOIA’s specific exemptions to disclosure, it is presumed to be available for public inspection. *Nat’l Wildlife Fed’n v. United States Forest Serv.*, 861 F.2d 1114, 1116 (9th Cir. 1988).

The Service’s Response to the FOIA Request.

The Service provided three sets of documents to us in response to the FOIA Request. The documents provided indicate that there numerous other documents responsive to the FOIA Request are in the possession of the Service, but that the Service has withheld from disclosure. The Service refused to provide a number of documents to us, and that the Service has redacted information from other documents, on the purported grounds that the withheld documents are subject to the so-called “deliberative process exemption.” The withheld documents include, but are not limited to, the following:

- Documents identifying the names of review panel members engaged by the Service’s contractor;
- Attachments to e mail communications between the Service’s contractor (“AMEC”) and the Service regarding the Petition;
- Reports prepared by AMEC and panel members hired by AMEC;
- Service responses to questions posed by AMEC regarding the Petition; and
- Documents identifying attendees at meetings between the Service and AMEC.

FOIA Requires the Service to Provide the Withheld Documents.

None of the above-referenced documents are subject to the “Deliberative Process” exemption. First, the documents generated by AMEC and sent to the Service were not generated by the Service, and thus, by definition, are not “inter-agency or intra-agency” documents which would not be available by law to a party in litigation with the agency.

Second, the Service would be required to include all of the withheld documents in the administrative record of the Service’s action on the Petition. Thus, they would be required to be made available in litigation against the Service regarding its action on the Petition. The withheld documents would also certainly be subject to discovery under the Federal Rules of Civil Procedure.

Third, the deliberative process privilege does not apply to factual information, unless release of such information would reveal the deliberative process. *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866-67 (D.C. Cir. 1980). “The burden is on the agency to establish that all reasonably segregable portions of a document have been segregated and disclosed.” *Id.* at 1148.

The withheld documents include factual information that is not part of any deliberation by the Service. For example, the names and curriculum vitae of the individuals selected by AMEC to participate in the science panel are facts; They are not deliberation. Revealing the names and qualifications of these individuals would not disclose any deliberations of the Service. Similarly, the facts in the reports and other documents are just that – facts. Disclosing the facts in these documents as required by FOIA will not disclose the deliberations of the Service.

Service Consideration of Petition to Delist the Valley Elderberry Longhorn Beetle.

The valley elderberry longhorn beetle (“VELB”) is an insect that is endemic to the Central Valley of California. The VELB is associated with two species of elderberry

plants. Elderberry are found in diverse vegetation associations, ranging from lowland riparian forest to foothill oak woodlands, and VELB may occur in any of these locations.

Basis for the 1980 Listing. The Service listed the VELB in 1980 based on two of the five listing factors: (1) criterion one -- “the present or threatened destruction, modification, or curtailment of [the species’] habitat or range” and (2) criterion four -- “the inadequacy of existing regulatory mechanisms.” 16 U.S.C. § 1533(a)(1). *See* 45 Fed. Reg. 52803; 52804-52805 (1980).

The Service concluded that the VELB satisfied the first criterion because: (1) “the [VELB] is presently known from less than 10 localities in Merced, Sacramento, and Yolo Counties;” (2) the habitat of the VELB has “largely disappeared throughout much of its former range due to agricultural conversion, levee construction, and stream channelization;” and (3) remnant populations in state and county parks are threatened by clearing of undergrowth. 45 Fed. Reg. 52805 (1980). At the time of the listing, the Service concluded that “[t]here currently exist no State or Federal laws protecting this species.” 45 Fed. Reg. 52805 (1980).

Status Review Concludes That VELB is No Longer Threatened and Recommends Delisting.

Since the listing of the VELB in 1980, many different persons conducted dozens of surveys of VELB in its historic range. The best scientific data available present a dramatically different picture of VELB presence throughout the Central Valley, and demonstrate that assumptions the VELB range is restricted to a few, threatened locations is no longer correct.

Nearly 200 records of VELB occurrence -- contained in the California Natural Diversity Database (“CNDDB”) -- reveal that the VELB is distributed across an area more than 500 miles long and 150 miles wide, extending into Shasta County to the north and to Fresno County in the south, making the VELB one of the more widely distributed animal species in California. VELB occupancy data obtained from habitat conservation planning efforts and Service biological opinions confirm the expansive distribution of the

VELB. See VELB Distribution Map, Biological Opinion and HCP Locations (ECORP 2005).

The VELB's range extends throughout the Central Valley and associated foothills from the watershed of the Central Valley on the west and approximately the 3,000-foot elevation contour on the east. The data reveal that the range of the VELB far exceeds that of its non-listed coastal relative, the California elderberry longhorn beetle, *Desmocerus californicus californicus*. Moreover, the VELB is now known to occur outside of riparian corridors, in non- riparian communities, such as oak woodlands, foothill pine-oak woodlands, and chaparral.

The Service cited the following reasons, among others, supporting its delisting recommendation:

1. **The range of VELB is dramatically improved from the assumed range of the species at the time of the listing.** At the time of its listing in 1980, the VELB was believed to be restricted to 10 locations along the American and Merced Rivers and Putah Creek in California's Sacramento Valley. The Status Review found that "the known range now extends from southern Shasta County to Fresno County and from the east side of the Coast Range to the foothills of the Sierra Nevada in the Central Valley." Status Review, p. 4.
2. **Substantial permanent protection for the beetle is now in place.** "Approximately 50,000 acres of existing riparian habitat has been protected in the Sacramento and San Joaquin Valley since 1980." Status Review, p. 7.
3. **Loss or riparian habitat has slowed.** "At the time of listing, loss of riparian habitat was identified as the primary threat to the beetle. Since that time, the rate of riparian habitat loss has slowed due to efforts to protect and restore riparian areas." Status Review, p. 12.

Based on the conclusion in the Status Review, in October 2012, the Service published a propose rule to delist the VELB based on the results of the Status Review. 77 Fed.Reg. 60238 (Oct. 2, 2012).

The Service Reverses Course and Withdraws Proposed Delisting Rule.

Two years later, the Service dramatically changed course, and withdrew the proposed rule to delist the VELB. 79 Fed.Reg. 55,874 (Sept. 17, 2014) (attached). The Service claimed that “because the best scientific and commercial data available, including our reevaluation of information related to the species’ range, population distribution, and population structure, indicate that threats to the species and its habitat have not been reduced such that removal of this species from the Federal List of Endangered and Threatened Wildlife is appropriate.” *Id.*

CONCLUSION

The record of the Service’s consideration of the listing and delisting of the coastal California gnatcatcher and the VELB exemplifies the resistance within the Service to the delisting of species – even in circumstances where published and peer reviewed papers and the Service’s own status review document that the original grounds for the listing no longer exist or are now known to be incorrect.

Mrs. LUMMIS. I thank the witness.

Mr. Bousman, you are recognized for 5 minutes.

STATEMENT OF JOEL BOUSMAN

Mr. BOUSMAN. Thank you, Chairman Lummis, Ranking Member Lawrence, and members of the Interior Subcommittee.

My name is Joel Bousman. I am a rancher and county commissioner in Sublette County, Wyoming, currently serving as second vice president for the Western Interstate Region of the National Association of Counties. Today, I am speaking to you as a Sublette County, Wyoming, commissioner.

When a species is put on the Endangered Species Act list, it's a bit like checking into Hotel California. You need to look no further than the Great Lakes wolf to find that barriers to delisting species are a nationwide problem with implementation of the ESA.

At the county level, we do not deny the value of protecting truly endangered species. But it is troubling to us that the goal of the ESA appears to be permanent and perpetual listings rather than species recovery. It is also troubling that the ESA itself has created a system that incentivizes closed-door litigation over cooperation with local governments.

Often, when we think about the ESA, we tend to think about the Federal Government's relationship to the States. All across the West, State game and fish agencies are the local experts. They should be trusted with managing our wildlife appropriately.

However, it is important to understand that the Fish and Wildlife Service also has an obligation to consult with and receive input from counties affected by petition listings and regulations written as a result of those listings. Section 1533 of the ESA twice lists counties as necessary partners in the process. While the language is clear, its overly vague instructions let the Fish and Wildlife Service off the hook on any meaningful coordination with counties. This is a part of the ESA that is crying out for congressional attention.

The National Association of Counties has adopted a permanent policy that seeks to improve the ESA by mandating that, "Federal agencies treat State and county governments as cooperating agencies with full rights of coordination, consultation, and consistency to decide jointly with the appropriate Federal agencies when and how to list species, designate habitat, and manage for species recovery and delisting."

What is it that counties have to offer that others do not? First and foremost, what we have to offer is a broad view on both the need for ESA listing and the effects on our counties resulting from those listings.

By the very nature of the charge of the office, a county commissioner must take into account the health and welfare of their entire county—its people, land, water, and wildlife. We have found in Wyoming that the most successful efforts of Federal land managers on any topic have been ones that were developed collaboratively with local governments. The best decisions are made by people working together on the ground at the local level.

As it is currently written, the ESA does not promote and certainly does not require collaboration with local governments. This

is a mistake. The Fish and Wildlife Service would benefit from a coordinated effort with local governments, not required at this time. Such a change would create more meaningful conservation, which should be our collective goal. It would also help to inoculate the Fish and Wildlife Service from the kinds of groups who appear to be more interested in money to be made from litigation than boots-on-the-ground species conservation.

There may have been a time in America's past when inflexible laws were necessary to overcome cultural apathy towards conservation, but, as has been so eloquently explained many times by this subcommittee's chairman, America's signature conservation laws have not kept pace with our cultural conservation ethic.

Allowing for greater local input, understanding the custom and culture of the local community, and an honest assessment of socioeconomic impacts is not a threat to species viability. Rather, it would be a help in creating regulations when they are necessary that can be embraced at the local level. The lack of intentional coordination with local governments is a barrier to delisting and would be easy to remedy in looking to improve the ESA.

Thank you, and I look forward to your questions.

[Prepared statement of Mr. Bousman follows:]

**Testimony of the Honorable Joel Bousman
Commissioner, Sublette County, Wyoming
Chairman, Public Lands Committee, Wyoming County Commissioners Association
2nd Vice President, Western Interstate Region of the National Association of Counties
Committee on Oversight and Government Reform
Subcommittee on the Interior, Hearing on
“Barriers to Endangered Species Act Delisting, Part I”
April 20, 2016**

Thank you Chairman Lummis, Ranking Member Lawrence, and members of the Interior Subcommittee.

My name is Joel Bousman; I am a rancher and County Commissioner in Sublette County Wyoming, and Chairman of the Public Lands Committee of the Wyoming County Commissioners Association. I also serve as the 2nd Vice President of the Western Interstate Region of the National Association of Counties, whose membership consists of fifteen Western states and hundreds of counties across the West.

As many of us in the West have known for quite some time, when a species is put on the Endangered Species Act list, it's a bit like checking into the Hotel California. But the inability for listed species to leave the endangered species list is no longer a fact just for westerners. One need look no further than the Great Lakes wolf to find that barriers to delisting fully recovered species is a nationwide problem that plagues the successful implementation of the ESA as a whole.

That is why the topic of this hearing is so very important. At the county level, we do not deny the value of protecting truly endangered species. But it is troubling to see that for some the goal of the ESA appears to be permanent and perpetual listings rather than actual species recovery. It is equally troubling that the ESA itself has created a system that favors closed-door litigation over transparent cooperation with local governments.

With that in mind, I want to address you about the role county government can play in effective wildlife management and in improving the outcomes of the ESA.

Often when we think about species conservation and the ESA we tend to think about the federal government's relationship to the states. There is good reason for this. In Wyoming and all across the West, state game and fish agencies are local experts that can and should be trusted with managing wildlife appropriately. However, it is important to understand that the Fish and Wildlife Service also has an obligation to consult with and receive input from counties affected by petition listings and regulations written as a result of ESA listings.

Section 1533(b) of the ESA twice lists counties as necessary partners in the process. First, when deciding upon whether a species is threatened or endangered, the Fish and Wildlife service must take into account the conservation efforts not only of the state, but also of the state's political subdivisions. Later in the same section the Fish and Wildlife Service is required to give actual

notice of any new regulation or designation to counties and invite comment from counties about those regulations.

Despite this language, I am concerned that too often the federal government either ignores its obligations to counties, or acknowledges counties only as a “check-the-box” exercise. While the language is clear, its overly-vague instructions let the Fish and Wildlife Service off the hook on any meaningful coordination with counties. If we want a law that leads to successful conservation and actual recovery of species, this is a part of the ESA that is crying out for Congressional attention.

The National Association of Counties, which represents America’s 3,069 county governments, urban and rural, has adopted into its permanent platform important goals for modernizing the ESA to ensure it is a more successful law. Specifically, the NACo platform acknowledges that the ESA is a critically important law, and it goes on to say:

“NACo supports reforming the ESA to mandate that the federal government treat state and county governments as cooperating agencies with full rights of coordination, consultation, and consistency to decide jointly with appropriate federal agencies when and how to list species, designate habitat, and plan and manage for species recovery and de-listing.”

But why? What is it that counties have to offer that others do not when it comes to engagement on ESA petitions, listings, regulations, or delistings?

First and foremost, what we have to offer is a broad view on the necessity for, the pitfalls of, and the effects on our counties resulting from ESA listings. Federal and even state agencies can sometimes be hindered by the narrow focus of their particular agency mission. Industry and NGO stakeholders take a narrow view. But by the very nature of the charge of the office, a county commissioner must take into account the health and welfare of their entire county: its people, land, water and wildlife.

We have found in Wyoming that the most successful efforts of federal land managers have been ones that were developed collaboratively with local governments. FLPMA’s requirements of coordination and CEQ’s cooperating agency process, while not silver bullets, provide the framework and the flexibility for local governments and the federal agencies to at least attempt a collaborative approach. Sometimes this process works and other times it does not, but as it is currently written, the ESA does not promote, and certainly doesn’t require that level of collaboration with local governments.

That omission of law is to the detriment of successful species recovery because it marginalizes the very people who can be most effective in developing conservation proposals that are accepted at the local level. County officials have more on-the-ground and specific knowledge of wildlife in our counties and how management decisions might create ripple effects impacting other issues. County officials can serve as a bridge between the federal agencies and the people living in our counties if we are allowed to do so.

In addition, we often find ourselves as a bridge between federal agencies themselves. Again thanks to our broad charge as local officials, we, by necessity, work with every agency. As a result, we sometimes find ourselves trapped between two agencies with different missions and we become the messenger between them.

This very scenario played out recently in an issue dealing with potential take of Grizzly Bears in the Bridger-Teton national forest in Sublette County. Livestock grazing permittees found themselves in a very difficult situation as the “take” of grizzlies was approaching the limit under the federal management plan. It took the county bringing together the Forest Service and the Fish and Wildlife Service, with help from our Governor, to reach an appropriate resolution.

The moral of the story is that the Fish and Wildlife Service stands to gain from a coordinated effort with local governments – a coordinated effort not currently required in the ESA. Not only would such a change create more meaningful conservation – which should be our collective goal, but it also helps to inoculate the Fish and Wildlife Service from the kinds of groups and individuals who appear to be more interested in the money to be made from litigation than in actual, boots-on-the-ground species conservation.

There may have been a time in America’s past when inflexible laws were necessary to overcome cultural apathy toward conservation. But as has been so eloquently explained many times by this subcommittee’s chairman, America’s signature conservation laws have not kept pace with our cultural conservation ethic – what you, Chairman Lummis, have called our 21st century conservation ethic.

Allowing for greater local input, engaging in efforts to understand the customs and culture of the local community and undertaking an honest assessment of socioeconomic impacts of the ESA is not a threat to species viability. Rather, it can and should be a benefit in creating necessary regulations that can be embraced at the local level. The best decisions are always made by local people working collaboratively with state and federal agency personnel at the ground level.

The Endangered Species Act, unfortunately, is a law deeply rooted in a 20th century model of top-down mandates. The ESA should be a mechanism that provides support and resources to states and local governments. In our estimation, the lack of specific and intentional coordination with local governments is a barrier to de-listing, and perhaps one of the easiest problems to remedy that would benefit species in need of conservation and recovery efforts.

Thank you and I look forward to your questions.

Mrs. LUMMIS. I thank the witness.
And, Mr. Glicksman, you are recognized for 5 minutes.

STATEMENT OF ROBERT GLICKSMAN

Mr. GLICKSMAN. Madam Chair, Ranking Member Lawrence, and subcommittee members, my name is Robert Glicksman. I'm the J.B. & Maurice C. Shapiro Professor of Environmental Law at the George Washington University Law School, although I speak today solely in my personal capacity. I've taught and written about environmental and natural resources law for 35 years and am a co-author of the leading treatise on public natural resources law. I appreciate the opportunity to testify today on the Endangered Species Act.

I'll make several points.

First, as the Government Accountability Office has recognized, the success of the Endangered Species Act cannot be measured in delisting alone. By one account, more than 250 species would have disappeared in the U.S. during the ESA's first 30 years if they hadn't been listed.

As of 2014, about three dozen species had been down-listed from endangered to threatened and three times as many have been delisted as declared extinct since the ESA's adoption. The condition of other species is improved, though not yet enough to justify delisting. One study found that 90 percent of species are recovering at the rate specified by their Federal recovery plans.

Species recovery could be slow for reasons having nothing to do with the ESA's utility. Species are not listed until they are already in very bad shape. It's not surprising that it may take years or even decades to bring them back from the brink.

Some species are slow to respond to recovery efforts. They may reproduce slowly; face ongoing, unabated threats; or require habitat that government hasn't yet been able to secure.

Recovery efforts may hinge on unavailable information about threats facing species or how best to mitigate them. Both the GAO and Fish and Wildlife Service biologists have found that ESA recovery plans play an important role in identifying actions that scientists deem most important to recovery.

Second, resource constraints have prevented the ESA from being even more successful in staving off species decline and promoting recovery. Congress has long funded the ESA at levels inadequate to enable the Fish and Wildlife Service to carry out its responsibilities. Researchers have estimated that over the past 15 years spending to protect listed species has covered only about a third of the recovery needs.

A study published last month found a strong correlation between recovery funding and trends in population levels. It found that only about 12 percent of listed species are receiving funding at levels prescribed by their recovery plans but that recovery goals are 2.5 times more likely to be met for those species than for those inadequately funded.

Congress should redress the chronic underfunding of ESA, as Fish and Wildlife Service Director Dan Ashe has called on it to do. He has also recommended increasing financial incentives for species conservation by non-Federal actors. But instead of continuing

or increasing programs that assist States and private parties in conserving listed species, Congress is cutting or ending these effective programs. They include programs to fund acquisition of land needed to support listed species and to help farmers protect biodiversity on their land.

Third, some trace difficulties in ESA's implementation to efforts by citizen groups to compel species listing through petitions filed with the Fish and Wildlife Service or lawsuits in Federal court. Congress has recognized the vital role that citizens can play in helping to implement laws that protect civil rights, voting rights, consumer protection, and the environment.

Citizen-initiated lawsuits help ensure that individuals and groups from across the political spectrum with a wide range of interests can call on the Federal courts to ensure accountability of agencies and their compliance with conditions Congress imposed on them. Those maintain that the Fish and Wildlife Service has been both too aggressive and not aggressive enough in protecting species. Those who want both less and more government intervention have consistently taken advantage of their access to the courts.

Senator Edmund Muskie recognized decades ago that the concept of compelling agencies to carry out their duties is integral to democratic society. Administrative failure should not frustrate public policy, and citizens should have the right to seek enforcement.

Congress will authorize suits against the Fish and Wildlife Service to enforce listing-related duties, to increase opportunities for citizen participation in the policymaking process, and to address concerns that political pressure might discourage listing of deserving species. According to a prominent ESA expert, citizen suits have played an important role in almost every aspect of ESA implementation.

Greater funding would be one way to redress or at least address the backlog that the Fish and Wildlife Service is currently experiencing in responding to petitions both to list and delist species.

I look forward to your questions.

[Prepared statement of Mr. Glicksman follows:]

**Statement of Robert L. Glicksman
to the House Oversight and Government Reform Committee's Subcommittee on Interior
Hearing on "Barriers to Endangered Species Act Delisting, Part I"
April 20, 2016
Room 2154 Rayburn Office Building**

Chairman Lummis, Ranking Member Lawrence, and members of the subcommittee, I appreciate the opportunity to testify today on the implementation and impact of the Endangered Species Act (ESA).

My name is Robert Glicksman. I am the J.B. & Maurice C. Shapiro Professor of Environmental Law at The George Washington University Law School. I am also a member scholar of the Center for Progressive Reform (CPR), although I am here today strictly in my personal capacity. I have taught and written about environmental, natural resources, and administrative law for 35 years, and am a co-author of the leading treatise on public natural resources law.

I make four main points. First, the Endangered Species Act (ESA) has achieved considerable success in achieving its conservation goals. Second, budgetary constraints have prevented the two agencies that oversee implementation of the statute, the Interior Department's Fish and Wildlife Service (FWS) and the Commerce Department's National Marine Fisheries Service (NMFS), from compiling an even better track record.¹ Third, citizen participation in ESA implementation has played an important role in promoting the statute's goals. Fourth, Congress in 1973 had good reasons for allocating to the federal government the primary responsibility for implementing the ESA (although it also sought to solicit state participation, accommodate state wildlife and water resource policies, and encourage federal-state partnerships), and those reasons remain just as valid today as they were then.

¹ For convenience sake, references in this statement to the FWS are often meant to include both agencies.

The Impact of the Endangered Species Act

A common criticism of the ESA is that the small number of species delisted by the FWS since the statute's adoption is a mark of its failure to achieve Congress's goal of conserving endangered and threatened species.² But the number or percentage of listed species that have been delisted is a simplistic and potentially misleading indicator of the ESA's success (or lack thereof).³ About ten years ago, the U.S. Government Accountability Office (GAO) issued a pair of reports assessing the reasons why listed species do or do not recover to the point that justifies delisting them. The GAO acknowledged in one of the reports that "one of the most important measures of [the ESA's] success is the number of species that have 'recovered,' or improved to the point that they no longer need the act's protection."⁴ It added, however, that determining the extent to which the Act's provisions have achieved success is a tricky business: "Supporters of the act claim it is an indication of success that only nine species protected by the act have become extinct. Critics, on the other hand, claim it is an indication of failure that [at that time] only 17 species protected by the act have recovered."⁵ The GAO itself took the position that the number of delistings that have occurred is "not a good gauge of the act's success or failure; additional information on when, if at all, a species can be expected to fully recover and be removed from the list would provide needed context for a fair evaluation of the act's performance. Similarly, estimates of the total costs

² 16 U.S.C. § 1531(c)(1) (2006).

³ The Congressional Research Service reported in 2014 that "[i]n the 40 years since ESA was enacted, 58 U.S. and foreign species or distinct population segments thereof have been delisted." Congressional Research Serv., *The Endangered Species Act (ESA) in the 113th Congress: New and Recurring Issues* 6 (Jan. 13, 2014). Among these are the American alligator, bald eagle, brown pelican (in two areas), peregrine falcon (two subspecies), gray wolf (in four areas), and gray whale (except the Western Pacific Ocean). *Id.* As of April 17, 2016, the FWS listed 63 species as having been delisted. U.S. Fish and Wildlife Serv., Environmental Conservation Online System, http://ecos.fws.gov/tess_public/reports/delisting-report

⁴ U.S. Government Accountability Office, *Many Factors Affect the Length of Time to Recover Select Species*, GAO-06-730, at 1 (2006).

⁵ *Id.* at 2. See also Endangered Species Act, Congressional Working Group, Report, Findings and Recommendations 6 (Feb. 4, 2014), https://drive.google.com/a/law.gwu.edu/folder/view?id=0BzLuyVNx7K0leGxSTUE3YjNjQlk&usp=sharing_cid&ts=5712c73d&tid=0BzLuyVNx7K0ld3dIY3RMZU1FZXM.

to recover the species would be necessary to evaluate whether sufficient resources have been devoted to recovery efforts.”⁶

For what it is worth, as of 2014, three times as many species had been delisted as declared extinct since the ESA’s adoption.⁷ Further, by one account, more than 260 species would have disappeared in the U.S. during the ESA’s first 30 years if they had not been listed and protected under the ESA.⁸ In addition, as of 2014, about three dozen species had been downlisted from endangered to threatened.⁹ The condition of other species has improved, though not enough yet to justify delisting them.¹⁰ Still another approach to measuring the impact of the ESA is to assess the proportion of the recovery objectives identified in species recovery plans that have been achieved. The FWS has provided information that is more nuanced than a calculation of the number of delisted species by describing the status of listed species, which covers a spectrum that includes presumed extinct, declining, uncertain, stable, improving, or recovered and delisted.¹¹ One study has found that 90 percent of species are recovering at the rate specified by their federal recovery plans.¹²

⁶ U.S. Government Accountability Office, *Endangered Species: Time and Costs Required to Recover Species Are Largely Unknown*, GAO-06-463R, at 1 (2006). See also *id.* at 5 (“The success of the Endangered Species Act is difficult to measure because some of the recovery plans we reviewed indicated that species were not likely to be recovered for up to 50 years. Therefore, simply counting the number of extinct and recovered species periodically or over time, without considering the recovery prospects of listed species, provides limited insight into the overall success of the services’ recovery programs.”).

⁷ Congressional Research Serv., *supra* note 2, at 6.

⁸ Alisha Falberg, *The Pricelessness of Biodiversity: Using the Endangered Species Act to Help Combat Extinction and Climate Change*, 33 UCLA J. L. & PUB. POL’Y 135, 154 (2015).

⁹ *Id.*

¹⁰ *Id.* at 6-7. See also Daniel B. Evans et al., *Species Recovery in the United States: Increasing the Effectiveness of the Endangered Species Act*, 20 ISSUES IN ECOLOGY 1, 1 (Winter 2016) (“The [ESA] has succeeded in shielding hundreds of species from extinction and improving species recovery over time.”).

¹¹ See, e.g., U.S. Fish and Wildlife Serv., *Report to Congress on the Recovery of Threatened and Endangered Species, Fiscal Years 2009-2010*, at 10-47. By one recent account, 43% of endangered species on the list are considered stable or improving, 30% are considered in decline, 24% are considered in unknown status, while only 1% is believed extinct. Nicholas Primo, *Federal v. State Effectiveness: An Analysis of the Endangered Species Act and Current Attempts at Reform*, 7 PEPPERDINE POL’Y REV., Article 5, at 4 (2014), <http://digitalcommons.pepperdine.edu/ppr/vol7/iss1/5/>.

¹² Daniel J. Rohlf, *The Endangered Species Act at Forty: The Good, the Bad, and the Ugly*, 20 ANIMAL L. 251, 273 (2014) (citing Kieran Suckling et al., Ctr. for Biological Diversity, *On Time, On Target: How the Endangered Species*

For these reasons, the FWS has rejected delisting as the most accurate benchmark for the ESA's success. It has argued that:

the success of the Service and the Endangered Species Act (ESA) cannot be measured in delisting alone. Instead, the Service's effectiveness in its implementation of the ESA should be measured in the number of species that have been saved from extinction since their listing, the number of populations that have been stabilized since a species' listing, and the number of populations that have increased since a species' listing even if the species has not been delisted.¹³

Moreover, recovery is not necessarily quick, linear, or uniform across listed species. Based on a review of 31 species listed at the time, the GAO concluded about ten years ago that:

Many factors affect the length of time it will take to recover the 31 species we reviewed, and some may not be recovered at all. These factors range from the successful removal of the primary threat faced by a species, to difficulty protecting a species' habitat or difficulty understanding what threats a species is facing. The length of time it has taken, or is expected to take, to recover these species, ranges from less than a decade to possibly more than a century.¹⁴

For example, FWS biologists told the GAO that 12 of the 31 species the GAO studied could spend more than 50 years on the endangered species list, and some might never recover. The agency's biologists predicted that some species would not recover for many decades, not because the ESA is an ineffective vehicle for promoting recovery, but because those particular species are slow to

Act Is Saving America's Wildlife (May 2012), http://www.esasuccess.org/pdfs/110_REPORT.pdf [<http://perma.cc/5VQW-M9F4>]).

¹³ U.S. Fish and Wildlife Serv., *Report to Congress on the Recovery of Threatened and Endangered Species, Fiscal Years 2009-2010*, at i.

¹⁴ U.S. Government Accountability Office, *Many Factors Affect the Length of Time to Recover Select Species*, GAO-06-730, at 3 (2006).

respond to recovery efforts.¹⁵ Some species, such as the northern right whale and the whooping crane, have a very low population and reproduce slowly or depend on habitat that takes a long time to develop. Others, such as the Indiana bat, face continuing threats that have not yet been abated. The recovery prospects of still other species were slowed because the FWS was having difficulty securing needed habitat, or because the agency lacked critical information about the threats facing the species or how to mitigate them. It is useful to recall that the ESA's listing provisions only kick in when a species, at best, is likely to be in danger of extinction within the foreseeable future. With this "emergency room" focus, it is not surprising that species recovery that justifies delisting can be a lengthy process.¹⁶ Weakening protections for listed species and their habitat would be the worst possible way to increase the pace of species recovery, just as kicking a sick person out of the hospital before she's completely well is the worst way to heal someone.

Ultimately, the GAO concluded that:

For all but one of the species we reviewed, recovery plans played an important role in recovery efforts by identifying many of the actions that the services' biologists deem most important to the recovery of the species. Although not all of these species are nearing recovery, the services' biologists report that the success that these species have had can be attributed, at least in part, to actions in the species' recovery plans.¹⁷

¹⁵ See U.S. Fish and Wildlife Serv., *Report to Congress on the Recovery of Threatened and Endangered Species, Fiscal Years 2009-2010*, at i:

[R]ecover cannot be fully measured by delistings and reclassifications from endangered to threatened (downlistings) alone. Most species' declines occur over decades and centuries prior to their listing, thus it may take many years and generations of a species before that species may be delisted or downlisted. Upon their listing, most species are so critically imperiled that the Service must first focus on population stabilization efforts in order to impede the species' rapid progression towards disastrously low population levels.

¹⁶ U.S. Government Accountability Office, *Many Factors Affect the Length of Time to Recover Select Species*, GAO-06-730, at 3-4 (2006).

¹⁷ *Id.* at 4.

In particular, the GAO found that of the 31 species it studied, implementation of ESA recovery plans was the primary driver in recovery that had already occurred or was expected to occur.¹⁸

Resource Constraints

To the extent that the ESA is not operating in the way Congress intended, or is not promoting the degree of species conservation it is capable of achieving, resource constraints are surely a factor. For more than 20 years, Congress has funded the ESA through annual appropriations at levels inadequate to enable the FWS to comply with its statutory duties on a timely basis. As one researcher succinctly put it, the “[a]gencies responsible for recovery of listed species are faced with an increasing workload and decreasing resources.”¹⁹ Others have estimated that over the past 15 years, total spending in protecting listed species has covered only about a third of their recovery needs.²⁰ A study by the Center for Biodiversity Outcomes and School of Life Sciences at Arizona State University published last month in the *Proceedings of the National Academy of Sciences* found “a strong correlation between recovery funding and [species] status. In particular, funding influences the relative frequency of success (i.e., increasing population) and failure (i.e., decreasing population) for listed species.”²¹ The study’s author found that only about 12 percent of listed species are receiving as much or greater funding than prescribed in their recovery plans, but that recovery goals are 2.5 times more likely to be met for those species than for those inadequately funded. Conversely, “among species in a state of injurious neglect, more than 100 species are receiving less than 10% of the investment needed as defined by their recovery plans.”²²

¹⁸ *Id.* at 19-20.

¹⁹ Leah R. Gerber, *Conservation triage or injurious neglect in endangered species recovery*, 113 PROCEEDINGS OF THE NAT’L ACAD. SCI. 3563, 3565 (Mar. 29, 2016).

²⁰ Evans, *supra* note 10, at 10.

²¹ Gerber, *supra* note 19, at 3564.

²² *Id.*

Further, federal expenditures are concentrated on a small number of listed species. Between 1998 and 2012, for example, “80 percent of all government spending went to support 5 percent of all listed species, whereas 80 percent of all listed species shared less than 5 percent of all funds.”²³ Part of the reason for this distribution has been congressional earmarks that “limit the Services’ abilities to distribute funds more equitably.”²⁴ In addition, discretionary allocation of funds by the FWS are not always driven by the comparative biological needs of listed species, but may be influenced by factors such as congressional representation, staff workload, and opportunities to secure matching funds.²⁵ The FWS seems especially resource poor compared to the NMFS. Even though the FWS manages more than 15 times as many listed species as the NMFS does, the 2012 FWS budget for endangered species management was \$161 million, while the NMFS budget for ESA and related Marine Mammal Protection Act implementation during that same time was \$174 million.²⁶

One result of the agency’s limited funding has been that recovery plans have not always included measures biologists deemed important to species recovery. Worse yet, resource constraints have contributed to the FWS’s failure to even develop recovery plans for some listed species.²⁷ By necessity, the FWS has sought to prioritize its efforts to promote the recovery of listed species based on factors such as (1) the degree of threat confronting the species, (2) recovery

²³ *Id.* For figures on how much money was spent on each listed species in fiscal year 2014, see U.S. Fish and Wildlife Service, *Federal and State Endangered and Threatened Species Expenditures: Fiscal Year 2014*, https://drive.google.com/a/faw.gwu.edu/olderview?id=0BzLuyVNx7KOIYUVBT3lPQTtaSk0&usp=sharing_cid&ts=5712c71d&tid=0BzLuyVNx7KOId3dlY3RMZU1lFZXMj.
SPECIES EXPENDITURES

²⁴ Evans, *supra* note 10, at 10.

²⁵ *Id.* at 11.

²⁶ Natalie Lowell & Ryan P. Kelly, *Evaluating agency use of “best available science” under the United States Endangered Species Act*, 196 BIOLOGICAL CONSERVATION 53, 58 (2016).

²⁷ See U.S. Government Accountability Office, *Endangered Species Act: Many GAO Recommendations Have Been Implemented, but Some Issues Remain Unresolved*, GAO-09-225R, at 5 (2008) (listing figures for number of listed species and approved recovery plans).

potential (the likelihood for successfully recovering the species), and (3) taxonomy (genetic distinctiveness). Nevertheless, the agency has spent no money at all promoting recovery of some listed species for significant periods of time.²⁸ The GAO summarized the agency's plight as follows:

The Service faces a very difficult task—recovering more than 1,200 endangered and threatened species to the point that they no longer need the protection of the Endangered Species Act. Many of these species face grave threats and have been imperiled for years. There are few easy solutions. Like many other federal agencies, the Service has limited funds with which to address these challenges.²⁹

Congress should redress the chronic underfunding of the ESA, as FWS Director Dan Ashe has called on it to do. He has also recommended increasing financial incentives for species conservation by private landowners.

Instead of continuing or increasing programs that assist states and private parties in conserving listed species, Congress is cutting or ending these effective programs. For example, Congress has balked at reauthorizing the Land and Water Conservation Fund despite overwhelming support from the states. Money from the Fund helps states and federal agencies protect habitat for listed species. The House also voted to cut funds for the Conservation Stewardship Program, which among other things helps farmers protect biodiversity on their land.

The Role of Citizen Petitions and Listing Suits

Some observers trace the resource quandary facing the FWS to the activities of citizen groups who have sought to compel the agency to list additional species or designate critical habitat

²⁸ See U.S. Government Accountability Office, *Fish and Wildlife Service Generally Focuses Recovery Funding on High-Priority Species, but Needs to Periodically Assess Its Funding Decisions*, GAO-05-211, at 13 (2005).

²⁹ *Id.* at 30.

for species for which such habitat has not been identified. Aside from the usual ability of interested persons to provide input through the notice and comment rulemaking process, the ESA contains two principal mechanisms for participation by individuals and groups in its implementation. First, § 4(b) of the ESA requires the FWS, in accordance with a specified schedule, to respond to petitions by interested persons to add a species to or remove a species from the list of endangered or threatened species or to revise a critical habitat designation.³⁰ Second, like many of the federal environmental statutes, the ESA includes a citizen suit provision. These provisions typically authorize two kinds of actions: suits against regulated entities alleged to be in violation of statutory or regulatory provisions, and suits against the agencies responsible for administering the statutes for failure to perform nondiscretionary duties – i.e., those that Congress compelled the agency to take but which the agency has failed to take.

Congress has consistently recognized the vital role that citizens can play in helping to assist in the enforcement of laws that range from civil rights, voting rights, consumer protection, and environmental statutes, among others. Citizen suit provisions and other avenues for judicial review of agency decisions are critically important tools for ensuring that individuals and groups from across the political spectrum and with a wide range of interests can solicit the aid of the federal courts in promoting the accountability of administrative agencies and prevent them from straying from the constraints Congress placed on them when it delegated authority to them to administer these laws. In the context of the ESA, both those contending that agencies have been too aggressive and those arguing they have not been aggressive enough in species protection efforts – those who want less government intervention and those who want more – have consistently taken

³⁰ 16 U.S.C. § 1533(b)(3)(A) (2006).

advantage of these avenues of access to the courts. The founding fathers understood the need for an independent judiciary to hold other branches of government accountable.

The ESA's citizen suit provision authorizes both suits to enforce the ESA's provisions and suits to compel the FWS to perform nondiscretionary duties (what I have referred to as agency-forcing suits).³¹ Under the ESA, a citizen suit against the FWS to compel the performance of nondiscretionary duties covers alleged violations of § 4 of the statute, which governs decisions concerning species listings and critical habitat designations.³² Like other environmental citizen suit provisions, the ESA's provision allowing suits to compel performance of nondiscretionary duties is conditional. Litigants must provide the FWS with 60 days prior notice,³³ which provides a window of opportunity for the agency to settle with the prospective plaintiff before suit is even commenced.³⁴

Senator Edmund Muskie, the principal drafter of the Clean Air and Water Acts, justified legislation authorizing agency-forcing suits prior to the adoption of the Clean Air Act in 1970:

The concept of compelling bureaucratic agencies to carry out their duties is integral to democratic society. . . . The concept in this bill is that administrative failure should not frustrate public policy and that citizens should have the right to seek enforcement where administrative agencies fail.³⁵

Agency-forcing suits can enhance agency accountability, increase opportunities for citizen participation in the policymaking process, and induce agencies to overcome political obstacles to

³¹ Robert L. Glicksman, *The Value of Agency-Forcing Suits to Enforce Nondiscretionary Duties*, 10 WIDENER L. REV. 353 (2004).

³² 16 U.S.C. § 1540(g)(1)(C) (2006).

³³ 16 U.S.C. § 1540(g)(2)(C) (2006).

³⁴ Kirsten Nathanson, Thomas R. Lundquist & Sarah Bordelon, *Developments in ESA Citizen Suits and Citizen Enforcement of Wildlife Laws*, 29-WINT. NAT. RESOURCES & ENV'T 15, 16-17 (2015).

³⁵ 1 COMM. ON PUB. WORKS, A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 351 (1970) (remarks of Se. Muskie).

following legislative instructions.³⁶ Although agency-forcing suits may take a toll on agency autonomy, and interfere with agency agenda-setting and priorities, these factors should take a back-seat when litigants ask courts to compel agency compliance with nondiscretionary duties that Congress has seen fit to impose on the agency, thereby divesting the agency of autonomy with respect to performance of that duty.

The ESA's citizen suit provision rests on these same foundations. The rationale for allowing citizens to sue the agency for failing to comply with nondiscretionary statutory duties relating to species listings was to address Congress's concern that "political pressure might discourage the agencies from listing species that warranted protection."³⁷ Further, there is evidence that citizen suits and listing petitions are serving their intended functions. Professor Holly Doremus has concluded that citizen suits "have played an important role in almost every phase of ESA implementation, including obtaining the protections of the ESA for noncharismatic species."³⁸

There is no doubt that the FWS faces a backlog in responding to petitions for listing-related actions. But, according to one account, "[a] major reason for this backlog is that the FWS contrived its own lawful impediment for funding species protection when it requested and received a budget cap from Congress for its final listing decisions,"³⁹ which has been in effect since 1998. These efforts to bolster the FWS's ability to defend its delayed action in the face of citizen petitions appear counter-intuitive in that they respond to resource shortages by seeking to reduce agency

³⁶ Glicksman, *Agency-Forcing*, *supra* note 31, at 383.

³⁷ Candee Wilde, *Evaluating the Endangered Species Act: Trends in Mega-Petitions, Judicial Review, and Budget Constraints Reveal a Costly Dilemma for Species Conservation*, 25 VILLANOVA ENVTL. L.J. 307, 315 (2014).

³⁸ Holly Doremus, *Adaptive Management, the Endangered Species Act, and the Institutional Challenges of "New Age" Environmental Protection*, 41 WASHBURN L.J. 50, 58 (2001).

³⁹ Wilde, *supra* note 37, at 329. See also Eric Biber, *A Risky FWS Proposal to Limit ESA Petitions* (Apr. 4, 2011), <http://legal-planet.org/2011/04/04/a-risky-fws-proposal-to-limit-esa-petitions/> ("One reason FWS has so many deserving species waiting for listing is that for years Congress (at FWS's request) has placed a cap on the amount of money that can be spent on finalizing listing decisions.").

funds still further.⁴⁰ The agency's task has only become more onerous as increasing numbers of species merit the ESA's protections. According to ESA expert Dan Rohlf, "[i]n an age of accelerating threats to biodiversity," which include from habitat loss from climate change and the proliferation of invasive species, the budgets for Fish and Wildlife Service have not even been close to keeping up with the demands on the agency."⁴¹

The diversion of FWS resources from species and actions on which the agency prefers to focus to matters that are the subject of citizen petitions and citizen suits might be troublesome if the result has been to shift protection and recovery efforts from species with more urgent needs to those with less. But this does not seem to be the case. A recent empirical analysis of ESA-listed species compares FWS-initiated species with species whose listing processes were initiated by citizen petition or agency-forcing litigation.⁴² The study's authors concluded that "citizen-initiated species (petitioned and/or litigated) face higher levels of biological threat, and that "[l]itigated species are more threatened than nonlitigated."⁴³ In addition, they found that citizen-initiated species are more likely to be in conflict with development, and that species in conflict with development face greater biological threat levels than species not in conflict with development.⁴⁴ These findings led them to conclude that "[c]itizen groups play a valuable role in identifying at-risk species for listing under the ESA. . . . Our findings thus do not support calls for reducing or eliminating citizen involvement in the ESA."⁴⁵ They added:

Contrary to criticisms of citizen involvement in the ESA, petitions and litigation are potentially very important in selecting species worthy of protection. In many cases, outside

⁴⁰ Wilde, *supra* note 37, at 330.

⁴¹ Todd Woody, *Wildlife at Risk Face Long Line at U.S. Agency*, N.Y. TIMES, Apr. 20, 2011 (quoting Rohlf).

⁴² Berry J. Brosi & Eric G.N. Biber, *Citizen Involvement in the U.S. Endangered Species Act*, 337 SCI. 802 (Aug. 17, 2012).

⁴³ *Id.* at 802.

⁴⁴ *Id.*

⁴⁵ *Id.* at 803.

groups could serve as the only impetus for protection of biologically threatened taxa that would otherwise be ignored because they conflict with development projects and related political pressures or because they are low-profile subspecies.⁴⁶

The study stated that limited FWS budget and staff make it unlikely that the agency “will ever contain enough expertise to identify all species most worthy of protection”⁴⁷

One logical solution to both the resource constraints facing the FWS and the backlog of listing (and delisting)-related actions it faces would be to provide the agency with more, not less funding. As one observer explained:

Increased funding would ultimately benefit the FWS because it would allow the FWS to exercise higher quality decision-making. With more money, the FWS could increase staffing in order to address its requirements under the ESA effectively. Further, adequate funding would give the FWS the resources needed to take thought-out, timely action, which would result in a greater unlikelihood that courts find the FWS's actions arbitrary and capricious in judicial review suits.⁴⁸

It is important to note that after a settlement with environmental groups who had agency-forcing actions to list additional species, the FWS is good progress in clearing its backlog of more than 250 species that FWS had said deserve protection of the ESA, but for which the agency had said it lacked the resources to go through the process to actually list them. For several of these species, including the sage grouse, the FWS eventually found that it no longer needed to list them after the agency, in consultation with states and private landowners, helped devise cooperative conservation strategies that avoided the need for listing.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Wilde, *supra* note 37, at 339.

Recovery of Attorney's Fees

Under the so-called American Rule, the losing party in litigation is responsible for paying its own attorney's fees.⁴⁹ But Congress has created exceptions to that rule. In the Equal Access to Justice Act (EAJA) and in the judicial review provisions of many of the federal environmental statutes, Congress has authorized recovery of reasonable, market-based fees by prevailing parties. The ESA includes such a provision, which applies to citizen suits seeking to compel compliance with the FWS's listing duties, and which allows courts to require the government to reimburse successful citizen suit plaintiffs for reasonable attorney's fees.⁵⁰ These provisions are designed to facilitate individuals and groups to participate in statutory implementation and enforcement by acting as "private attorney generals."⁵¹ The Supreme Court recognized decades ago that a citizen bringing an enforcement action "does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority."⁵²

Congress enacted citizen suit provisions like the one in the ESA to help hold agencies accountable.⁵³ The fee-shifting provisions of the ESA and similar legislation are designed to enable ordinary citizens to take steps to ensure that agencies comply with statutory directives and implement the laws as Congress intended. Efforts to cap or otherwise restrict the recovery of market-based fees by litigants who succeed in demonstrating that the government has violated the law will only make it more difficult for citizens to hold agencies accountable in this manner. As the Supreme Court has noted, if a citizen lacks the resources to pursue an action to assure

⁴⁹ *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

⁵⁰ 16 U.S.C. § 1540(g)(4) (2006) (authorizing fee awards "whenever the court determines such award is appropriate"). The Supreme Court has interpreted similar language in other environmental statutes to restrict fee awards to prevailing parties. See *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983).

⁵¹ See S. REP. NO. 92-414, at 79080 (1971).

⁵² *Newman v. Piggie Bank Enter., Inc.*, 390 U.S. 400, 402 (1968).

⁵³ See Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 L. & CONTEMP. PROBS. 235 (1984).

compliance with the law, “his day in court is denied him [and] the congressional policy which he seeks to assert and vindicate goes unvindicated.”⁵⁴ Further, as FWS Director Ashe has pointed out, the amount of money the government pays out in attorney’s fees in ESA litigation is only a small fraction of the millions it spends each year implementing the statute.⁵⁵ He has characterized the operation of the citizen suit and attorney’s fee provisions as a strength, not a weakness, of the ESA.⁵⁶

Suits for civil rights violations and denial of veterans and social security benefits result in the vast majority of fee awards against government agencies. Broad-reaching efforts to eliminate or reduce these fee-shifting provisions would therefore penalize veterans and individuals who have been treated unjustly by federal agencies. Landowners and industry groups who successfully challenge agency decisions under the ESA are also entitled to fee awards, so that fee recovery is not limited to environmental public interest groups seeking additional listings. More targeted efforts directed at environmental public interest groups would be difficult to justify on equity grounds.

Judicial Review of Agency Science

The ESA requires the FWS to make its listing and delisting decisions on the basis of “the best scientific and commercial data available.”⁵⁷ Courts have construed the “best data available” language as not obligating the FWS to conduct studies to obtain missing data, but it cannot ignore relevant available biological information.⁵⁸ Judicial review of agency scientific determinations

⁵⁴ *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986).

⁵⁵ A Government Accountability Office Report issued last year found that FWS data show that the agency paid about \$1.6 million in attorney’s fees in the 26 cases from fiscal years 2004 through 2010. U.S. Gov’t Accountability Office, *Information on Cases against EPA and FWS and on Deadline Suits on EPA Rulemaking*, GAO-15-803T, at 13 (2015).

⁵⁶ Laura Peterson, *Lawsuits Not Hurting Endangered Species Act – FWS Director*, GREENWIRE, July 5, 2012.

⁵⁷ 16 U.S.C. § 1533(b)(1)(A) (2006).

⁵⁸ *Friends of Blackwater v. Salazar*, 691 F.3d 428, 434 (D.C. Cir. 2012); Congressional Research Serv., *supra* note 6, at 8-9.

under the ESA tends to be deferential. This approach is consistent with how courts in a variety of contexts have reviewed agency scientific determinations under a host of environmental laws. They have afforded considerable deference to such determinations – what some observers have referred to as “super deference”⁵⁹ – in applying the Administrative Procedure Act’s arbitrary and capricious standard of review.⁶⁰ The courts are typically wary of second-guessing the scientific expertise of the agencies, which they cannot hope to match.

Yet, the courts regard themselves as competent to remand to the agency if the agency’s reasoning process in support of its scientific determinations is flawed. For example, courts in environmental cases, including but not limited to ESA cases, will remand if the agency’s decision failed to explain how it moved from one step in a supposedly logical reasoning process to another, did not articulate at all how it dealt with a relevant statutory factor, rested on evidence that lacked any basis in the administrative record, or was internally inconsistent. In each instance, the deficiency is a gap in the agency’s chain of reasoning.⁶¹ In assessing judicial review of U.S. Forest Service decisions under the National Forest Management Act’s mandate to preserve biological diversity in the national forests as well as decisions implementing the ESA, I concluded several years ago that “[t]he courts have been wary of second-guessing the manner in which the environmental agencies have interpreted and applied science.”⁶² Notwithstanding this deferential posture, courts did invalidate science-based decisions in circumstances such as an agency’s

⁵⁹ See, e.g., Emily Hammond, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science* 109 MICH. L. REV. 733 (2011).

⁶⁰ 5 U.S.C. § 706(2)(A) (2006).

⁶¹ Christopher H. Schroeder & Robert L. Glicksman, *Chevron, State Farm and EPA in the Courts of Appeals in the 1990s*, 31 ENVTL. L. REP. 10351, 10403 (Apr. 2001).

⁶² Robert L. Glicksman, *Bridging Data Gaps through Modeling and Evaluation of Surrogates: Use of the Best Available Science to Protect Biological Diversity Under the National Forest Management Act*, 83 IND. L.J. 465, 483 (2008).

application of a model based on assumptions that were obviously flawed or arbitrary.⁶³ I believe this remains an accurate depiction of judicial review of agency scientific determinations in federal environmental cases, including those decided under the ESA. Courts have also reversed listing decision that were based on extraneous factors, such as political pressure from elected state officials, or when the agency's decision was inconsistent with the recommendations of its own staff scientists.⁶⁴ These situations tend to raise red flags that the decision was not solidly grounded in the science and that courts should scrutinize the scientific record more closely than they ordinarily would be willing to do.

Every case has a winning and a losing side. Sometimes the party unhappy with the result is the agency, sometimes it is an environmental NGO, and sometimes it is a commercial entity affected by the agency's decision to permit or restrict development. Just because that party does not like the court's result does not necessarily mean that the court applied insufficiently rigorous or excessive scrutiny to the scientific determinations of the agency whose decisions were at issue.

Federal vs. State Authority to Manage Wildlife

Beginning in 1970, Congress chose to carve out an expanded role for the federal government in environmental protection. It did so for a host of well understood reasons relating to collective actions problems that include the advantages of resource pooling, a desire to restrict negative inter-jurisdictional spillovers, and an effort to put a stop to the anticipated race to the bottom. I will not explain here these justifications for a strong federal presence, although I have

⁶³ *Id.* at 485. See also Holly Doremus, *The Purposes, Effects, and Future of the Endangered Species Act's Best Available Science Mandate*, 34 ENVTL. L. 397 (2004) (describing willingness of courts in some cases to reverse agency decisions based on scientific determinations).

⁶⁴ *E.g.*, *Save Our Springs v. Babbitt*, 27 F. Supp. 2d 739, 745, 748 (W.D. Tex. 1997).

done so in my scholarship.⁶⁵ Suffice it to say that these remain persuasive reasons for federal leadership on endangered species protection.⁶⁶

At the same time, Congress recognized that states had long played a leading role in wildlife management, and it did not seek to oust the states from that role. Instead, it accommodated state authority and policies, to the extent they do not conflict with federal law, and it encouraged active state involvement in ESA implementation.⁶⁷ Section 6 of the ESA, for example, requires the FWS to cooperate “to the maximum extent practicable” with the states and authorizes federal financial assistance to states entering cooperative agreements for state establishment of adequate and active programs for species conservation.⁶⁸

In recent years, the FWS has cooperated with the states on significant issues related to endangered species. For example, I already referred to cooperative efforts with the states that led to a decision not to list the sage grouse. The same kind of process avoided the need to list dunes sagebrush lizards. The FWS has also used its authority under § 4(d) of the ESA⁶⁹ to tailor protections for threatened species in a way that largely defers to state authority – northern long-

⁶⁵ See Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation*, 102 NW. U. L. REV. 579 (2008); Robert L. Glicksman, *Climate Change Adaptation: A Collective Action Perspective on Federalism Considerations*, 40 ENVTL. L. 1159 (2010).

⁶⁶ See, e.g., Primo, *supra* note 11, at 10:

The federal government, for all of its slow and bureaucratic methods of implementing any policy, has the most resources, the widest scope and the greatest authority to gather and disseminate important information crucial to formulating policies. This is especially the case for environmental policy, as only the federal government has the resources and manpower to fund government research on the latest methods of species protection and conservation. Only the federal government has the scope to study and interact with all 50 states to see emerging trends as well as dangers to the species that inhabit the country. Without the federal government through its stewardship from the Secretary of the Interior and the policy actions of the USFWS, states would struggle greatly not only to innovate but to maintain their endangered species protective policies, if not fail outright.

⁶⁷ See, e.g., 16 U.S.C. § 1531(a)(5) (2006) (encouraging states to develop and maintain conservation programs that meet national and international standards); *id.* § 1501(c)(2) (declaring federal policy of cooperation with state and local agencies to resolve water resource issues in conservation of endangered species).

⁶⁸ 16 U.S.C. § 1535(a), (c)-(d) (2006). See also *id.* § 1535(f) (saving state laws that do not conflict with the ESA).

⁶⁹ 16 U.S.C. § 1533(d) (2006).

eared bats are a recent example. And the FWS has largely deferred to the state of Florida to authorize actions that “incidentally take” threatened species.⁷⁰

Although some states have taken up the challenge and become active participants in ESA protection efforts, others have been more reluctant, or have adopted different priorities than those reflected in the ESA. For example, Congress passed an appropriations rider in 2011 delisting gray wolves in Montana and Idaho, but not Wyoming, based on the two states’ efforts to adopt adequate protective measures.⁷¹ Wyoming subsequently revised its wolf management plan, which the FWS accepted. But a court rejected the agency’s decision to delist the wolf in Wyoming because the state’s plan lacked binding commitments to implement the regulatory mechanisms needed to protect the wolf.⁷² The court rejected a challenge to the agency’s scientific determinations, however, deferring to the FWS’s finding of sufficient genetic exchange between Wyoming wolves and other populations of wolves in the northern Rocky Mountains, and characterizing the plaintiff’s challenge as amounting to “nothing more than competing views about policy and science.”⁷³ The court also found the FWS’s analysis of what constituted a “significant portion of the [wolf’s] range” to be reasonable. Some observers have attributed the court’s rejection of the Wyoming plan to the state’s “reticence to commit to wolf recovery,” and in particular, to “adopt regulatory mechanisms to supplant the ESA’s protection from human caused mortality.”⁷⁴ The court’s rejection of the plan, in this view, reflected neither overly rigorous judicial review of the FWS’s scientific determinations nor an attempt by Congress or the FWS to shut the state out of

⁷⁰ See Nathan Hale, *Enviros Balk at Federal Plan To Let Florida Enforce ESA*, LAW 360 (Mar. 29, 2013), <http://www.law360.com/articles/428540/enviros-balk-at-federal-plan-to-let-florida-enforce-esa>.

⁷¹ Department of Defense and Full-Year Continuing Appropriations Act of 2011, Pub. L. No. 112-10, § 1713, 125 Stat. 38 (2011).

⁷² *Defenders of Wildlife v. Jewell*, 68 F. Supp. 3d 193 (D.D.C. 2014). That decision is currently pending on appeal.

⁷³ *Id.* at 207.

⁷⁴ Martha Williams, *Lessons from the Wolf Wars: Recovery v. Delisting under the Endangered Species Act*, 27 FORDHAM ENVTL. L. REV. 106, 148-49, 155 (2015).

the process of crafting species protection policies. Rather, the decision was based on the court's determination that the statute precludes delisting absent a demonstration of the state's commitment to taking the steps needed to prevent species from slipping back into danger.

Mrs. LUMMIS. I thank the witness.
And, Ms. Budd-Falen, you are recognized for 5 minutes.

STATEMENT OF KAREN BUDD-FALEN

Ms. BUDD-FALEN. Thank you.

Chairman Lummis and Minority Leader Lawrence, honorable members of the committee, my name is Karen Budd-Falen. I am a fifth-generation rancher who is working to ensure that that ranch we have in Big Piney, Wyoming, is secured for a sixth generation. I'm also an attorney who has worked to protect our ranching heritage, our way of life from the Federal Government overreach, including that of the Endangered Species Act.

Chairman Lummis went through some of the numbers today, and I think those numbers are important to understand. There are 2,258 plant and animal species listed as threatened or endangered, 1,592 of which are located in the U.S.

Part of listing a species is also critical habitat designation, yet only 791 of these species have critical habitat designated. And even with that backlog, the Fish and Wildlife Service data indicate that there is another 1,508 species that are pending for review as either listed—pending as listing as threatened or endangered.

Today's hearing is about delisting, so we should consider the number of species that have been delisted and recovered. According to the Fish and Wildlife Service, that total number is 63. Analyzing that list, the numbers of species that have been removed because of a listing error is 19. The number that were recovered is 34. The number that has gone extinct is 10.

And while the Obama administration is correct that it has, "recovered more species than ever," part of that recovery is based on development of recovery plans. The problem is that the number of recovery plans has significantly been decreasing. For example, if you look between 1990 and 1999, 843 species were included in a recovery plan. Between 2000 and 2009, the number of species included in a recovery plan dropped to 235, and from 2010 to today, only 177 species are included in a recovery plan.

I would argue that there are three problems with the delisting of species, and the number-one problem is priority. It does appear to me that, when you look at the decrease in species included in a recovery plan versus the increased number of species listing, that the priority is in listing, not in setting recovery plans to get species off the list.

When you look at the Congressional Record for the Endangered Species Act, it talked about recovery and getting species off the list. There is nothing in the Congressional Record that indicated that species were supposed to get put on a list and parked there forever.

The second problem that I see happen is that so often recovery goals are simply not set. And that's a hard issue for me to understand. If the Fish and Wildlife Service has enough information to determine that the number of species is getting close to extinct, certainly at the same time it can come up with the converse to determine how many species we need so that the species is protected.

And once you set forth that number and those goals, then landowners, then States, then the Federal Government knows what to manage for. But so often these recovery numbers and the numbers

of what to manage for are never included so that the public doesn't know what the end goal is. And I think that that is a barrier to getting species off the list. If we know where we're going, we can figure out how to get there.

The third problem I see is such difficulty in developing candidate conservation agreements with assurances or candidate conservation agreements. Currently, only 77 CCAAs or CCAAs—excuse me—CCAs are in existence.

I've worked on numerous of those. One of the big differences we have in those is looking at different regions of the Fish and Wildlife Service have completely different policies on what is an adequate CCA or a CCAA. Look at the one for the greater sage-grouse, which did keep the sage-grouse from being listed, but the policies in the different regions of the Fish and Wildlife Service on how to develop those candidate conservation agreements were completely all over the board.

A lot of people yesterday in the hearing touted the CCAA for the greater sage-grouse in Oregon and Washington because they had a saying there, "What is good for the bird is good for a herd." The problem is, when you talk to those Fish and Wildlife Service people, they will tell you that they went out on a limb because the candidate conservation agreement looked at the entire ecosystem, not just at the species, and when you look at the entire ecosystem, they were able to develop a CCAA that dealt with all of the issues and protected landowners as well as protecting a bird. You can't do that if you're singly focusing on the species.

The second issue that we come up with in terms of CCAAs and CCAs is the difficulty in litigation. If you don't have enough time in the litigation, you can't allow the policy to work.

With that, I would stand for questions. Thank you.

[Prepared statement of Ms. Budd-Falen follows:]

U.S. House of Representatives
 Committee on Oversight and Government Reform,
 Subcommittee on the Interior
 “Barriers to Endangered Species Act Delisting Part 1”
 April 20, 2016
 Rayburn House Office Building Room 2154

My name is Karen Budd-Falen. I grew up as a fifth generation rancher and have an ownership interest in my family owned ranch west of Big Piney, Wyoming. I am also an attorney emphasizing in private property and environmental litigation (including the Endangered Species Act). I represent the citizens, local businesses, private property owners and rural counties and communities who live with threatened or endangered species listing decisions--even though those decisions are not recovering species because of a broken system that these landowners, rural communities and private businesses did not create.

The U.S. Fish and Wildlife Service (“FWS”) characterizes the purpose of the Endangered Species Act (“ESA”) “to protect and recover imperiled species and the ecosystems upon which they depend.” Emphasis added. According to the FWS website, last visited on April 4, 2016, there are a total of 2258 plant and animal species on the threatened or endangered species list¹. Of these, only 791 currently have designated critical habitat. There are also 59 species on the “candidate species” list; 72 more species proposed to be listed; and 1377 species that have been petitioned for listing, uplisting or critical habitat designation with the petition under review by the FWS. Although the “mega-species settlement agreement” of July 12, 2011, was supposed to curb listing petitions to allow the FWS to catch-up on its backlog, just since the mega-species settlement agreement was signed by the Court, 65 more listing petitions have been filed including 135 additional species².

In stark contrast, according to the FWS “delisting report,” only 63 species have been removed from the endangered species list. See Exhibit 1. Breaking down that figure, 19 species were removed from the ESA list because of an error in the original data, 10 species went extinct and only 34 out of 2258 were recovered. That is a .0150 success rate.

¹ Specifically there are 898 U.S. plants, 694 U.S. animals, 3 foreign plants and 663 foreign animals on the list.

² On the pending listing petitions alone, the Center for Biological Diversity is responsible for filing 44 of them including 583 species; WildEarth Guardians is responsible for filing 32 petitions including 716 species; and other environmental groups such as the Defenders of Wildlife, Natural Resources Defense Council, Friends of Animals and others have filed 31 petitions including 44 species.

The FWS data base also includes species for which conservation efforts or conservation agreements are in place that preclude the need for listing. Seventy species are on that list. See Exhibit 2.

There are a total of 1434 species with recovery plans according to the FWS data base. While that may seem like a major accomplishment, the number and rate of recovery planning has significantly decreased in the last 20 years. For example, 843 species³ were covered by a recovery plan from 1990 through 1999; 235 species were included in a recovery plan from 2000 through 2009 and only 177 species have been included in a recovery plan from 2010 through today.

I. OVERVIEW OF THE ENDANGERED SPECIES ACT

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted.” See Tennessee Valley Authority v. Hill, 437 U.S. 153, 180 (1978). The goal of the Act is “to provide for the conservation, protection, restoration, and propagation of species of fish, wildlife, and plants facing extinction.” Wyoming Farm Bureau Federation v. Babbitt, 199 F.3d 1224, 1231 (10th Cir. 2000), citing S. Rep. No. 93-307, at 1 (1973) and 16 U.S.C. § 1531(b). Under the ESA, a threatened species means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant part of its range, see 16 U.S.C. § 1532 (20); and an endangered species means any species which is in danger of extinction throughout all or a significant portion of its range other than insects that constitute a pest whose protection would present an overwhelming and overriding risk to man. 16 U.S.C. § 1532(6).

A. Listing

Anyone can petition the FWS or NOAA⁴ (collectively “FWS”) to have a species listed as threatened or endangered. 16 U.S.C. § 1533. Listing decisions are to be based on the “best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A). However, there is no requirement that the federal government actually count the species populations prior to listing. There are no economic considerations included as part of the listing of a threatened or endangered species.

³ Of these 843 species however, 453 were included in the Hawaii plants and birds recovery plans.

⁴ The National Oceanic and Atmospheric Administration (“NOAA”) is responsible for the ESA with regard to marine and anadromous species.

The listing process is also based on very specific time frames as set forth in the Act. If the FWS fails to meet any of these time frames, litigation can occur. See Exhibit 3. During the listing process alone, there are eight separate points where Federal Court litigation can be filed against the FWS. Id.

B. “Take” is Prohibited

Once a species is listed as threatened or endangered, prohibitions against “take” apply. 16 U.S.C. § 1540. “Take” means to harass, harm, pursue, hunt, shoot, wound, kill, capture, or collect, or attempt to engage in such conduct. 16 U.S.C. § 1532(19). “Harm” within the definition of “take” means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing breeding, sheltering or feeding. 50 C.F.R. § 17.3. Harass in the definition of “take” means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering. 50 C.F.R. § 17.3. If convicted of “take,” a person can be liable for civil penalties of \$10,000 per day and possible prison time. 16 U.S.C. § 1540(a), (b).

C. Critical Habitat Designation

Once a species is listed as threatened or endangered, the FWS must “to the maximum extent prudent and determinable,” concurrently with making a listing determination, designate any habitat of such species to be critical habitat. Id. at § 1533(a)(3). Originally, critical habitat (“CH”) included “specific areas” see 16 U.S.C. § 1532(5)(A) and must be “defined by specific limits using reference points and lines found on standard topographic maps of the area.” 50 C.F.R. § 424.12(c); see also § 424.16 (CH must be delineated on a map). For “specific areas within the geographical area occupied by the [listed] species,” the FWS may designate CH, provided such habitat includes the species’ “primary constituent elements” (“PCEs”) which are 1) the “physical or biological features;” 2) that are “essential to the conservation of the species;” and 3) “which may require special management considerations or protection.” 16 U.S.C. § 1532(5)(A)(I); 50 C.F.R. § 424.12(b).

CH must also be designated on the basis of the best scientific data available, 16 U.S.C. § 1533(b)(2), after the FWS considers all economic and other impacts of proposed CH designation. New Mexico Cattle Growers Assoc. v. United States Fish and Wildlife Service, 248 F.3d 1277 (10th Cir. 2001) (specifically rejecting the “baseline” approach to economic analyses); but see Arizona Cattle Growers Association v. Salazar, 606 F.3d 1160 (9th Cir. 2010) (adopting the baseline or incremental impacts approach). CH may not be designated when information sufficient to perform the required analysis of the impacts of the designation is lacking. 50 C.F.R. § 424.12(a)(2). The FWS may

exclude any area from CH if it determines that the detriments of such exclusion outweigh the benefits, unless it determines that the failure to designate such area as CH will result in extinction of the species concerned. 16 U.S.C. § 1533(b)(2). This is called the “exclusion analysis.”

Between 2012 and 2016, the Obama Administration issued four new final regulations and two new policies significantly expanding the size, reach and management of critical habitat. These regulations and policies were issued in a piece meal fashion, which significantly limited the public's ability to understand the full impacts of the new regulations.

Those new regulations and policies include:

- Final Rule, Implementing Changes to the Regulations for Designating Critical Habitat, February 11, 2016 --- includes “the principals of conservation biology” as part of the “best scientific and commercial data available.” Conservation biology was not created until the 1980s and has been described by some scientists as “agenda-driven” or “goal-oriented” biology.
- Final Policy on Interpretation of the Phrase “Significant Portion of its Range,” July 1, 2014 --- with regard to threatened or endangered species listing, rather than listing species within the range where the problem lies, all species throughout the entire range will be listed as threatened or endangered.
- Final Regulations Implementing Changes to Regulations for Designating Critical Habitat, February 11, 2016 — based upon the principals of conservation biology, including indirect or circumstantial information, the FWS will initially consider designation on both occupied and unoccupied habitat, INCLUDING habitat with POTENTIAL PCEs for breeding, sheltering and feeding. In other words, not only is the FWS considering habitat that is or may be used by the species at the present time, the FWS will consider habitat with the potential to develop PCEs sometime in the future. There is no time limit on when such future development of PCEs will occur or what types of events have to occur so that the habitat will develop PCEs (global warming/cooling/other events, etc.). The FWS will then look outside occupied and unoccupied habitat to decide if potential habitat will develop PCEs and should be designated as critical habitat now. Additionally, the FWS has determined that critical habitat can include temporary or periodic habitat, ephemeral habitat, potential habitat and migratory habitat, even if that habitat is currently unusable by the species.

- Final Rule “Revised Implementing Regulations for Requirements to Publish Textual Description of Boundaries of Critical Habitat,” May 1, 2012 --- the FWS will no longer publish the legal descriptions or GIS coordinates for critical habitat, rather it will only publish maps of the critical habitat designation in the Federal Register, rather than any textual descriptions on the habitat locations.
- Final Rule, Revisions to the Regulations for Impact Analysis of Critical Habitat, August 28, 2013 --- economic analysis for critical habitat will include ONLY economic costs attributable SOLELY to the proposed critical habitat designation and will exclude any cost that could be attributed to both species listing and critical habitat designation. This rule substantially reduces the costs of critical habitat because the FWS can claim that almost all costs are based on the listing of the species because if not for the listing, there would be no need for critical habitat.
- Final Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, February 11, 2016 — related to the August 13, 2013 rule described above, the FWS has determined that while completing the economic analysis is mandatory, the consideration of whether habitat should be excluded based on economic considerations is discretionary. In other words, under the new policy, the FWS is no longer required to consider whether areas should be excluded from critical habitat designation based upon economic costs and burden (i.e. exclusion analysis is discretionary).
- Final Rule, “Definition of Destruction or Adverse Modification of Critical Habitat,” February 11, 2016 --- the problem with these new rules is what it means if private property (or federal lands) are designated as critical habitat. Even if the species is not present in the designated critical habitat, a “take” of a species can occur through “adverse modification of critical habitat.” For private land, that may include stopping stream diversions because the water is needed for downstream critical habitat for a fish species, or that haying practices such as cutting or management of invasive species to protect hay fields are stopped because it will prevent the area from developing PCEs in the future that may support a species. It could include stopping someone from putting on fertilizer or doing other crop management on a farm field because of a concern with runoff. Designation of an area as critical habitat (even if that area does not contain PCEs now) will absolutely require more federal permitting (i.e. section 7 consultation) for things like crop plans, or conservation plans or anything else requiring a federal permit. Under this new regulation, “adverse modification of critical habitat” can include “alteration of the quantity or quality” of habitat including causing

“significant delays” in the capacity of the habitat to develop PCEs in the future, over time.

D. Recovery Planning

Once a species is listed, the FWS is mandated to develop a recovery plan. 16 U.S.C. § 1533(f). However, while the requirement to write the plan is mandatory, the ESA provides no time frame in which a recovery plan is to be developed. Without such time frame, there is very little opportunity to force the FWS to complete a recovery plan.

Recovery plans must incorporate, at a minimum, (1) A description of site-specific management actions necessary to achieve recovery of the species; (2) Objective, measurable criteria which, when met, would result in a determination that the species be removed from the list; and (3) Estimates of the time and costs required to achieve the plan's goal. See Exhibit 4.

E. Candidate Conservation Agreements with or without Assurances

Another way to protect species and keep them off the ESA list is through the development of Candidate Conservation Agreements (“CCA”) and Candidate Conservation Agreement with Assurances (“CCAA”). A CCA or a CCAA is a formal agreement between the Service and one or more parties to address the conservation needs of proposed or candidate species, or species likely to become a candidate, before it becomes listed as endangered or threatened. Landowners voluntarily commit to conservation actions that will help stabilize or restore the species with the goal that listing will become unnecessary.

F. Section 7 Consultation

Once a species is listed, for actions with a federal nexus, ESA section 7 consultation applies. Section 7 of the ESA provides that “[e]ach Federal agency [must] in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary. . . to be critical” 16 U.S.C. § 1536(a)(2). The first step in the consultation process is to name the listed species and identify CH which may be found in the area affected by the proposed action. 50 C.F.R. § 402.12(c-d). If the FWS determines that no species or CH exists, the consultation is complete. If there are species or CH in the area, the FWS must approve the species or habitat list. Id. Once the list is approved, the action agency must prepare a Biological Assessment or Biological Evaluation (“BA”). Id. The contents of the BA are at the discretion of the agency, but must evaluate the potential effects of the

action on the listed species and critical habitat and determine whether there are likely to be adverse effects by the proposed action. Id. at § 402.12(a, f). In doing so, the action agency must use the best available scientific evidence. 50 C.F.R. § 402.14(d); 16 U.S.C. § 1536(a)(2). Once complete, the action agency submits the BA to the FWS. The FWS uses the BA to determine whether “formal” consultation is necessary. 50 C.F.R. § 402.12(k). The action agency may also request formal consultation at the same time it submits the BA to the FWS. Id. at § 402.12(j-k). During formal consultation, the FWS will use the information included in the BA to review and evaluate the potential effects of the proposed action on the listed species or CH, and report these findings in its biological opinion (“BO”). 50 C.F.R. § 402.14(g-f). Unless extended, the FWS must conclude formal consultation within 90 days, and must issue the BO within 45 days. Id. at § 402.14(e); 16 U.S.C. § 1536(b)(1)(A).

If the BO concludes that the proposed action will jeopardize any listed species or adversely modify critical habitat, the FWS’s BO will take the form of a “jeopardy opinion” and must include any reasonable and prudent alternatives which would avoid this consequence. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h). If the BO contains a jeopardy opinion with no reasonable and prudent alternatives, the action agency cannot lawfully proceed with the proposed action. 16 U.S.C. § 1536(a)(2). If the BO does not include a jeopardy opinion, or if jeopardy can be avoided by reasonable and prudent measures, then the BO must also include an incidental take statement (“ITS”). 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(l). The ITS describes the amount or extent of potential “take” of listed species which will occur from the proposed action, the reasonable and prudent measures which will help avoid this result, and the terms and conditions which the action agency must follow to be in compliance with the ESA. Id.; see Bennett v. Spear, 520 U.S. 154, 170 (1997). See Exhibit 5.

G. Habitat Conservation Plans

Once a species is listed, ESA section 10 applies on private land, even if there is no federal nexus. In order to avoid the penalties for “take” of a species including modification of critical habitat, and still allow the use and development of private land, the ESA authorizes the FWS to issue ITSs to private landowners upon the fulfillment of certain conditions; specifically the development and implementation of habitat conservation plans (“HCPs”). 16 U.S.C. § 1539. A HCP has to include (a) a description of the proposed action, (b) the impact to the species that will result from the proposed action, (c) the steps that the applicant will take to minimize any negative consequences to the listed species by the proposed action, (d) any alternatives the applicant considered to the proposed action and why those alternatives were rejected, and (e) any other measures that the FWS may deem necessary for the conservation plan. 16 U.S.C. § 1539(a)(2)(A). Once a HCP is presented, the FWS must make certain findings before it can issue an ITS. Those findings include

(a) that the taking of the species is incidental to the proposed action, (b) that the proposed action implements a lawful activity, (c) that the applicant, to the maximum extent possible, will minimize and mitigate any negative impacts to the listed species, (d) that the HCP is adequately funded, (e) that the taking will not appreciably reduce the survival and recovery of the species, and (f) any other measures deemed necessary will be carried out. 16 U.S.C. § 1539(a)(2)(B). As a practical matter, mitigation means that the applicant will either fund programs supporting the listed species or will provide or set aside land. See Exhibit 6.

II. BARRIERS TO ENDANGERED SPECIES ACT DELISTING AND SPECIES RECOVERY

A. It is a Matter of Priority

The first barrier to delisting species is simply the fact that it is not a priority for the FWS to develop recovery plans and move species off the list. As shown by the statistics above, only .0150 percent of the listed species have been recovered. Informing this statistic is the fact that only a little over one-half of the species on the list are even included in a recovery plan and the rate of species now being included in a recovery plan has significantly dropped. For example, in the 1990s, 843 species were included in a recovery plan; in the 2000s 235 species included in a recovery plan; and from 2010 to the present 177 species have been included in a recovery plan. I would argue that shows that development of recovery plans is dropping in priority for the FWS.

I would also argue that there may be some valid reasons that development of recovery plans is slipping in priority with the federal government. The first problem is the fact that the Act establishes no time frame to develop a recovery plan. All the Act mandates that one be developed; no time frame is given, meaning any legal enforcement of the failure to develop a recovery plan in a timely manner has to be done through the Administrative Procedure Act's waiver that federal courts can "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). This type of litigation is difficult to bring and the federal courts do not have any type of consistent determination regarding how long an "unreasonable delay" is.

In contrast, the ESA contains very strict time frames for listing species and designating critical habitat. See Exhibit 3. Violation of those time frames has, and will continue, to result in significant litigation (resulting in significant payment of attorney's fees to environmental groups bringing such litigation). The federal courts have held that the time frames in the ESA are mandatory, despite the budgetary constraints or other timing issues of the federal agencies. Given that, I believe that the significant litigation being brought by special interest environmental plaintiffs is forcing the FWS to put recovery planning on

the back-burner just simply so the FWS can keep up with the litigation demands.

If fact, the FWS's documents prove that litigation is driving the agency's priorities, not sound science or administrative determinations. For example, a memorandum prepared by the Assistant Director for Ecological Services of the FWS in May 20, 2014, states that the priorities of the FWS will be to focus on court-ordered and settlement deadlines. To focus on that litigation, FWS states that "we do not plan to carry out the following . . . non-MDL findings and proposed rules, or recovery plan revisions." See Exhibit 7.

In other cases, the FWS has denied requests for extensions of time to comment on ESA 10(j) rules or has stated that certain activities have not been done because of the requirement imposed by litigation deadlines. See Exhibit 8. In other examples, both the Lesser Prairie Chicken listing and the failure of the FWS to update the Mexican wolf recovery plan were based on the deadlines that had been set through litigation that did not give the FWS enough time to complete its analysis.

B. Failure to Set Recovery Goals

Even if the FWS does not have time to complete full blown recovery plans, it would take little for the agency to set species number goals or habitat goals so that States and private landowners would have an objective to manage for. In other words, if the FWS has sufficient information to know that a species population is in decline and can determine that such decline is such a problem to warrant listing, the FWS should be able to determine how many species are required so the population is eligible for delisting. Such information should be included in the listing decision itself so that the public, as well as State agencies and other organizations, can have some idea of the scope and magnitude of the problem and can have a goal toward which they can work to alleviate the concern. In other words, even if a complete recovery plan is not developed, the FWS should be able to give landowners, the public and State agencies a target species number and a target of the amount and type of habitat that is necessary to start toward recovery of the species.

C. Difficulty in Developing CCAs and CCAAs

Although there have been some success stories using the development of CCAs and CCAAs to keep species from being listed (such as the dunes sagebrush lizard), more success could be had if the process to develop CCAAs and CCAs was not so regulatorily burdensome, expensive and time-consuming. As Exhibit 2 shows, there are only 70 CCAAs or CCAs in existence that have either justified species' delisting or have kept an impaired species on the ESA list. As have been stated before, if the goal is to recover species, this number should not be so low.

There are several issues with the development of CCAAs and CCAs which keep them from being developed and implemented to recover species. First, as was experienced with the CCAAs developed related to the sage grouse, the FWS policies or requirements for the holder of a CCAA or CCA changed depending on the FWS region in charge. The greater sage grouse is a species that covers 165 million acres across 11 western states and three different regions of the FWS. Each of those different regions had different requirements regarding the type of entity that could hold a CCAA or CCA, how the quality of the sage grouse habitat could be assessed, and the privacy considerations given to landowners who enrolled for a CCAA or CCA. While I recognize the vast differences in types of landscape over 11 Western states, this is one species and it should be assumed that its habitat needs should be the same whether that species is in Wyoming or Oregon. However, because the proponents of the CCAAs were dealing with different FWS regions, the rules changed, so the proponents could not take the work in one region and apply it to their situation. That problem significantly added to the time and expense for state and local governments to develop their sage grouse CCAAs.

A second problem with the CCAAs and CCAs is that often they are single-species focused rather than ecosystem focused. This problem was extremely problematic in developing the numerous CCAAs for the sage grouse. The sage grouse is called a “predator species,” meaning that the health of the species directly correlates to the health of the rangeland. Those FWS regional offices that went “out on a limb” (a quote from the FWS) and tried to create CCAAs that looked at the health of the ecosystem, and worked with the landowners who would be managing their private property under the CCAA, seemed far more successful because landowners understood that the activities they were agreeing to under the CCAA were good for the land. In fact, of all the CCAAs and CCAs I have assisted in developing, the ones that focus on ecosystem health rather than single species management seem to be more successful.

Another example of CCAAs that have been implemented to protect threatened or potentially endangered species is the Rangewide Plan for the Lesser Prairie Chicken (“LPC”). The LPC Rangewide Plan includes five states, each including part of the 182,843 square mile range of the LPC. The Plan took three years to write and included countless meetings and data analysis. Despite the FWS’s approval of the Rangewide Plan and the CCAAs that were based on the Plan, in April, 2014, the FWS listed the LPC as threatened. Litigation occurred by both State governments, industry groups and private landowners on one side who wanted to give the LPC Rangewide Plan the opportunity to work, and environmental groups who wanted the LPC uplisted to endangered on the other side. With regard to whether the listing decision could be delayed to determine if the lands conserved through the various CCAAs would protect the species, the FWS determined that it could not delay the listing decision based upon a litigation settlement agreement (the Multi-species settlement agreement of 2011). Thus, rather than focusing on the on-

the-ground management and protection of the species, the FWS decision was driven by litigation deadlines. On February 29, 2016, the Federal District Court for the Western District of Texas vacated the LPC listing decision because the FWS had failed to adequately consider whether the Rangewide Plan complies with the FWS requirements in the Policy for Evaluation of Conservation Efforts When Making Listing Decisions, 68 Fed. Reg. 15100-02 (March 28, 2003) ("PECE Policy"). As of yet, an appeal of that decision to the Fifth Circuit Court of Appeals has not been filed.

In sum, although the title of this hearing is "Barriers to Delisting," what it truly happening is that species are simply not being recovered. Whether that recovery is by delisting because affirmative action has not been taken to remove the species from the list or because of the low priority and lack of incentives to develop management plans to keep species from being listed, the reality is that species conservation is suffering. Regardless of the Administration, litigation under the ESA is exponentially increasing which is driving more species to be listed⁵. Because the ESA allows for the recovery of attorney's fees, I would argue that ESA litigation is a business decision that is shutting down the FWS from implementing the entirety of the ESA.

Should you have any questions, please do not hesitate to contact me.

⁵ A review of the Center for Biological Diversity's ("CBD") website shows that solely related to ESA, the following cases have been filed: 20 cases in 2016; 26 cases in 2015; 28 cases in 2014; 29 cases in 2013. With regard to the WildEarth Guardians litigation related solely to the ESA: 5 cases have been filed in 2016; 11 cases filed in 2015; 11 cases filed in 2014; 4 cases filed in 2013.

Mrs. LUMMIS. Thank you, panel.

And I'm pleased to report that it appears that we'll be able to complete our hearing without being interrupted by votes. So the strategy of moving this hearing an hour earlier has been successful, allowing this panel an opportunity to ask questions of you, which we will begin now.

So thank you for your testimony.

And the chair will yield herself 5 minutes to begin questioning.

Ms. Budd-Falen, how did we get to the point where the Fish and Wildlife Service spends most of its time in court rather than helping boots-on-the-ground recovery of species?

Ms. BUDD-FALEN. Madam Chairman, I think the answer to that is, when you look at the Endangered Species Act, the only timeframes that are included are listing timeframes. You petition a species for listing; the Fish and Wildlife Service is mandated to respond in 90 days. If they miss that 90-day deadline, litigation can occur. If they meet the 90-day deadline, then they have a 12-month finding that the Fish and Wildlife Service has mandated on issuing. If they miss that deadline, litigation can occur.

There are seven different places—excuse me, eight different places in the listing process that litigation can occur, and litigation occurs in all eight of those areas. But if you look on the converse side, there are no mandatory timeframes, so you can't mandate that the Fish and Wildlife Service create a recovery plan or delist a species, because there's no mandatory timeframe for that.

And so I think the act was set up to enforce the listing but not give us the chance in court to enforce delisting or recovery plans because the Fish and Wildlife Service always prioritizes something else first.

Mrs. LUMMIS. Thank you.

A question for Mr. Baier. Now, in terms of the use of litigation not just to force listings but to block delistings, do you think in Congress in 1973 they envisioned or intended litigation to play this role under the ESA?

Mr. BAIER. No. The answer is no.

My next book is—that we're well into the research on—is on the Endangered Species Act and its history and its application and the flash points that we're experiencing with it. In that research, I've been going around the country interviewing the people that wrote that act, starting in 1972—well, going back to 1966, the Organic Act. And I've been talking with the folks that actually wrote this act back in 1972, 1973.

John Dingell was the floor manager. He wrote the preface for this book. And I've asked John and I've asked many others that were really involved with this back then about that very question, and they just assumed delisting would happen. So I said, why in the 1973 act does the word "delisting" only appear once? The word is only in that act one time. And I said, what were you folks thinking back then about this? And they said, well, you know, our focus was protecting the eagle, the condor, the iconic species in America, and that's what our focus was.

So the whole etiology of the act, when you read it, read it through, the systemic focus of the act is on listing, and they just assumed delisting would occur. And they have all said universally

that if they could go back today they would've put appropriate criteria in for delisting.

Mrs. LUMMIS. Thank you.

Ms. Budd-Falen, you began to describe the process to reach a candidate conservation agreement. What are some of the ways that the process could be improved?

Ms. BUDD-FALEN. I think the first way that the process could be improved is to allow the process to look at the ecosystem of the species rather than the species itself. I realize that the ESA says species and the ecosystems upon which they depend. But the litigation occurs over species listing, and so that is the focus. I think to broaden that to look at landscapes, at ecosystems would help.

The second thing I think we have to look at is really focusing on making on-the-ground improvements to the land. I think that so often these end up in big paper exercises with no incentives for landowners to participate, that it's very difficult to convince them to do it.

For example, if you look at the lesser prairie chicken range-wide plan, that was actually a really good combination of allowing oil and gas development to put up funding so that private landowners could then protect species. That is a great balance.

The problem with the lesser prairie chicken listing was that the time ran out because of this litigation settlement agreement, so the Fish and Wildlife Service said, even though we agree with this range-wide plan, even though we think this is a wonderful thing, we are going to not consider it and list the species anyway. So you had litigation occur. The time just ran out.

Mrs. LUMMIS. Thank you.

My time has expired, and I will now recognize the ranking member, Mrs. Lawrence, for 5 minutes.

Mrs. LAWRENCE. I really appreciate the witnesses and the different perspectives that you're bringing today.

According to the Fish and Wildlife Service and the National Marine Fisheries Service, State agencies are the primary protectors of endangered species. "States possess primary authority and responsibility for the protection and management of fish, wildlife, plants, and their habitats."

Too often, States are either unwilling or unable to exercise that authority effectively. That is when the Federal Government must step in. The reason species are listed for protection under the Endangered Species Act is a failure of States to protect species from extinction.

So, Mr. Glicksman, will you comment, do States have the ability to be proactive and to implement their own conservation efforts before a species needs to be considered for listing?

Mr. GLICKSMAN. They do. Congress was careful in enacting the Endangered Species Act to preserve traditional State prerogatives in many areas in managing wildlife. The Endangered Species Act vests the Fish and Wildlife Service and the National Marine Fisheries Service with authority as kind of a backstop in the event that the States don't take adequate measures to protect wildlife species within their borders.

The statute preempts State authority only if it is in conflict with measures adopted by the Federal Government under the Endan-

gered Species Act. So the States really have the first opportunity to protect endangered species, and the Fish and Wildlife Service will step in only in emergencies—that is, when the species are already on the brink of extinction.

Mrs. LAWRENCE. Have there been cases in which the State did fail to implement and follow through on an adequate plan to ensure the recovery?

Mr. GLICKSMAN. There are certainly examples of that, and one that comes to mind is with respect to the gray wolf in Wyoming. There you had a species that was in trouble in at least three States—Montana, Idaho, and Wyoming. Montana and Idaho came up with plans that adequately addressed the problems that the species was encountering. Wyoming did not initially.

A court remanded the Wyoming plan back to the State to fix it. The Fish and Wildlife Service ultimately approved Wyoming's plan, but on judicial review a court concluded that the plan was again inadequate, primarily because it did not include binding commitments to ensure that wolf populations remained above minimal levels specified in the recovery plan that the State had adopted.

Mrs. LAWRENCE. But there's been similar examples where delisting of wolves did not occur because judges noted a lack of protections as a reason to not delist the wolves. So we talked about litigation, but there also has been that role that the State has to play. And these States have included North and South Dakota, Iowa, and Indiana, just to name a few.

Do you believe, Mr. Glicksman, that the court was justified in finding that the unregulated killing of wolves might represent a real threat to their survival?

Mr. GLICKSMAN. One of the requirements that the agency has to take into account both in listing and delisting decisions is the adequacy of the existing regulatory mechanisms to protect a species.

I think the court in the gray wolf case concluded that, among other things, the State's designation of 90 percent of the State's territory as predator area for the wolf and its designation of only about 10 percent of the wolf habitat as trophy game area, in which the taking of wolves would be regulated and restricted by the State, was inadequate. The court felt that giving that degree of authority to hunters to kill wolves would not be sufficient to meet the target level specified in the plan of 10 breeding populations in 100 animals.

Mrs. LAWRENCE. Thank you.

Madam Chair, I yield back my time.

Mrs. LUMMIS. I thank the gentlelady and recognize the gentleman from Alabama, Mr. Palmer, for 5 minutes.

Mr. PALMER. Thank you, Madam Chairman.

Ms. BUDD-FALEN, recently the administration has come out with new regulations and policies for designating critical habitats for endangered species. Could you briefly describe for us some of the major changes these regulations create? I would like briefly, if possible.

Ms. BUDD-FALEN. I believe that the new Obama changes to the critical habitat rules between 2012 and 2016 completely turn over the designation of critical habitat to anything within the whim of the Fish and Wildlife Service. The new rules allow the designation

of potential critical habitat even if that habitat does not have the primary features of the habitat.

So it basically means that any circle can be drawn on a map and anything is now a critical habitat, which then makes it significantly harder for private property owners and Federal grazing permittees.

Mr. PALMER. What kind of effects would these regulations have on Federal, State, and private landowners?

Ms. BUDD-FALEN. Mr. Palmer, I think that these are going to have a significant impact. The problem is that the adverse modification rules were also changed, which means that now a private landowner or a State cannot adversely modify critical habitat, which means it would slow its progress toward becoming a critical habitat at some time in the future.

And we don't know when that future is. It could be you can't now, you know, cut your hay meadow or you can't now graze your field because in the next 200 years it may contain the features necessary for some threatened or endangered species. That's where the rub comes.

Mr. PALMER. And I'd also add that they really don't take into account the economic cost and the burden that's imposed by these critical habitat designations.

Ms. BUDD-FALEN. No. That was eliminated by the 2013 rule, which eliminates the consideration of economic analysis.

Mr. PALMER. And it doesn't take into account the burden on the private landowners.

Ms. BUDD-FALEN. No, sir.

Mr. PALMER. Let me transition here a little bit. One of my concerns with what's going on not only with the Fish and Wildlife and National—and the Marine Service—Marine Fisheries Service includes the EPA, and that is this whole issue of sue and settle, which you brought up, Mr. Glicksman.

Do you not see that as very problematic in terms of how it undermines the State's roles, as mentioned by Mrs. Lawrence?

Mr. GLICKSMAN. No, I don't see that as problematic. First of all, the States can take measures to prevent species from getting to the point that they are endangered or threatened, and the statute wouldn't be triggered in the first place—

Mr. PALMER. Well, let me cut you off there, because I don't think it's about how the State's taking the action in as timely a manner as some people want it. It's more a matter of how the statutes are implemented.

And, particularly, this prairie chicken, for instance, is a sue-and-settle issue. It's a consent decree. And—

Mr. GLICKSMAN. Well, courts have to approve consent decrees. So the court won't approve a decree that it regards as unfair or—

Mr. PALMER. That hasn't been the case. We know that there's court shopping, judge shopping. There's collaboration between these independent outside groups, so-called independent outside groups, and Federal agencies to really cook up a pre-agreement on this. So they file the suit and we don't fight it in court, where if we fought it in court I think the outcomes might be different.

Have you participated in any of the sue-and-settle lawsuits?

Mr. GLICKSMAN. I have not, no.

But I would point out that sue-and-settle techniques have been engaged in by litigants from a variety of interests. So, for example, there's been litigation in Utah over the scope of R.S. 2477 rights. Litigation was brought against the Federal Government——

Mr. PALMER. Yeah, but my point about this is that it is I think, not only a violation of the intent of the Clean Air Act, the Clean Water Act, the Endangered Species Act, it violates the matching principle that States had.

I mean, there's a great piece on this in the Harvard Journal of Law and Public Policy, and the Harvard Journal of Law and Public Policy article basically deals with the EPA, but I think the same principle applies.

What's going on with sue and settle is a violation of State rights and, I think, private property rights, as well. And it's using the courts in a very manipulative and, I think, disingenuous way to impose these regulations on the States and on private landowners.

Madam Chairman, I yield.

Mrs. LUMMIS. I thank the gentleman.

And I recognize the gentlewoman from the Virgin Islands, Ms. Plaskett.

Ms. PLASKETT. Thank you.

Mrs. LUMMIS. Did I pronounce that right?

Ms. PLASKETT. Yes, you did. Thank you.

Mrs. LUMMIS. Thank you.

Ms. PLASKETT. Good morning—or good afternoon to you all. Thank you so much more your time.

Mr. Thornton, you talked about litigation that you've been involved in and the scientific data indicating the issues involving delisting. That's particularly interesting to me, living in the Virgin Islands, the impediments to delisting that you've talked about.

Can you explain some of your thoughts on why this occurs and why it's so difficult to delist species?

Mr. THORNTON. Congresswoman, I think the fundamental reason is that, once a species is on the list, the inertia takes over within the regulatory agency. Very difficult to have them reverse that decision.

Frankly, the Endangered Species Act provides a lot of regulatory authority and power to the Fish and Wildlife Service, so I think the natural, kind of, human inclination of a regulator is to want to retain that authority.

And once a species is listed, it develops a constituency, usually, that become strong votes to retain that species on the list, even when the science emerges, as it did in the case I mentioned where we went from, frankly, 19th-century ornithology to very sophisticated genetic testing——

Ms. PLASKETT. You know, this is one time where with some of my colleagues on the other side I tend to agree. And I agree wholeheartedly with you as to the advocacy groups that come around and are formed when species come on the list.

I live in the U.S. Virgin Islands, and we have enormous impediments that are put on us with our economic development and the growth of the territories because of the endangered species listing and because once species are put on the list there is almost nothing we can do to adequately satisfy the needs of the—you know, you

talked about the U.S. Fish and Wildlife, the National Marine Fisheries Association, NOAA, others that keep us from being able to grow our economy.

I'm often, I think unfairly, labeled by many in my community as being against our natural resources, which I think is in—and not an environmentalist, which I think is an unfair label that has been put on me. I'm worried, quite frankly, about the extinction of the people of the Virgin Islands that are occurring because of the endangered species listing.

In August of 2014, 19 new corals were listed by the Endangered Species Act, requiring specific ways in which we could operate around these corals that were put on this list. It costs us now 30-percent more to develop in the territory because of this listing.

And that really necessitates, in some instances, developers leaving the area entirely. We've had projects—Williams and Punch—creating dolphins within our coral world—with Thatch Cay. Lots of development can no longer move forward because it takes 2 years to get a biological opinion passed by—and I see you're shaking your head, Ms. Budd-Falen—where it takes so long to come up with a plan that says how we're going to move the coral so that we can have sustainable projects take place.

And I'm not just talking about resorts that are created for visitors and people who want to come down and enjoy themselves. We were trying to move from fossil fuel oil to propane to reduce the cost of energy in an already exorbitant economy, and it took almost 2 years to get the permitting requirement because, in the time period that we put the permit, this listing came up in August 2014 that has absolutely crippled us.

I can't imagine what occurs in American Samoa and in Northern Marianas and Guam, where their way of life is being absolutely shut down because of this listing that's put on here. And the fishermen are no longer able to fish at all in many areas because of this listing.

Ms. PLASKETT. Once listed, it's almost impossible to go on with the delisting. I know the administration has said that they have about 28 percent that have come off of the list, but that is entirely not enough. And they do not have aggressive plans on how to move to delisting.

Mr. Glicksman, you talk about the States having inadequate measures. In the Virgin Islands, we believe that we've done and have been doing for hundreds of years a great job in preserving our natural resource. We understand that that is the most important resource that we have. And we are now feeling the effects of global warming that we had nothing to do with. And we are being penalized by the Federal Government by not allowing us to exact plans that we believe balance the needs of our natural resources and the needs of the people to have jobs and food and be able to sustain themselves with this endangered species.

Madam Chairwoman, I know that my time has expired. I guess I really didn't have any questions in the 5 minutes that I had, but I thought it was necessary to put on the record the concerns of the people of the Virgin Islands and, I'm sure, the concerns of many communities throughout the United States that feel that there needs to be a balance between the endangered species, which we

want to keep, as well as not endangering the lifestyles of the—what we believe are natural and fair lifestyles of Americans living in those areas.

Thank you.

Mrs. LUMMIS. The gentlewoman yields back.

And I think many people share the frustrations and the goals on a bipartisan basis of saving species, recovering species, and have the ethic to do so but are frustrated with a process that is actually beginning to interfere with the ability to recover those species in an effective and timely manner.

The chair now recognizes the gentleman from Montana, Mr. Zinke, for 5 minutes.

Mr. ZINKE. Thank you, Madam Chairman, and I appreciate the opportunity to be on your committee.

I guess—I, you know, listened to it. One is I think we need more scientists and less lawyers in the woods. I think that's an overriding conclusion.

And I appreciate—I can't wait to read your book, Mr. Baier. As a native son of Montana, I think you're aware of it.

When I looked at the sage-grouse—and I consider myself a Teddy Roosevelt Republican. When I looked at the sage-grouse, I talked to Director Kornze, and I asked him, why do you think the numbers of sage-grouse are low? And it depends on where in Montana. Now, bear in mind that Montana has the same distance between here and Chicago plus 2 miles. His immediate answer was oil and gas exploration. I found that somewhat ironic because, at the time, Montana had one oil derrick. Today, we have none.

So I asked him, does the plan take into consideration predators? We have a coyote population. We have more hawks. The eagle population is soaring, no pun intended. The answer was no. What about wildfires? The answer was no.

And the core of the issue was, what does a healthy population of sage-grouse look like? Because if we're going to target to return to a healthy population, then we should strive to a number. As a former SEAL commander, metrics are important. The answer was, we don't have one, but it is about habitat. And so, if you don't know the difference between Butte and Bozeman, then how can you manage a difference that Butte and Bozeman have?

So I guess my question would be to Mr. Bousman. Because, as I look at it, these collaborative efforts are so incredibly important, that we can come together on issues. Because we all value, I believe, endangered species, and we want to make sure we have healthy populations, but certainly local jurisdictions have a place in it.

So, Mr. Bousman, what level of engagement does the Endangered Species Act require between Federal officials and local?

Mr. BOUSMAN. Congressman Zinke, thank you for that question.

At this time, section 1533 of the ESA does say that consultation will occur when deciding whether or not a species is threatened or endangered. It also requires Fish and Wildlife Service to give notice of any pending new regulations or designation and invite comment from the counties.

But it does not require any defined level of cooperating agency status or collaboration. And I guess, as a local government official,

we continually work with both land management agencies in Wyoming—the Forest Service and the BLM. They are required through NEPA to designate local and State governments as cooperating agencies, and they're required to coordinate with any local plans they have in place. That's not true at Fish and Wildlife Service.

And I think it would be a great benefit if Congress could change the rules a little bit in terms of Fish and Wildlife Service and their endangered/threatened species management to require the same level of coordination and collaboration with local and State governments as what they do with the land management agencies. That has proven to work fairly well when it's taken advantage of.

And there's ways that that—it goes back to the whole idea that the best management decisions are made at the local level, by the local people, working together with the local Federal agency people and the community. And it takes into account the socioeconomic impact on the community, and it allows you to develop a plan for the species or for the habitat that takes into account those concerns. And it turns out to be a win-win for everyone.

Mr. ZINKE. Mr. Baier, in your book, do you estimate how much is spent every year on litigation by both outside sources and the agency?

Mr. BAIER. The low figure is a million dollars. The high figure is, as best I recall—I know Karen Budd-Falen published some numbers on that, and I forget—I cannot remember off the top of my head, but it was, I think, over \$2 million.

Mr. ZINKE. Is that from the agency or outside sources or combined?

Mr. BAIER. It's a combination of the fees that are paid out by the Treasury Department—even though the law says they're supposed to come out of the agency budget, they don't. The Department of Justice authorizes checks being written. It comes right out of the U.S. Treasury.

But on top of that you've got to then add the cost to the agency of all the personnel. And that's, from talking to all of the Fish and Wildlife Service Directors over the past years, they estimate, for every dollar of fee that goes out, anywhere from five to seven times that are spent in personnel costs.

Mr. ZINKE. Thank you.

And thank you, Madam Chairman. I yield back the rest of my time.

Mrs. LUMMIS. I thank the gentleman.

And with the committee's indulgence, we will do one more round of questioning but 4 minutes only per person. And then I would like to give each member of the panel 1 minute to say anything that they wish they could have said but didn't get to during the course of this hearing. Fair enough?

Okay. The chair recognizes herself for 4 minutes.

Mr. Bousman, do you think that the conservation ethic of Americans has changed? Do you think that local governments, such as yours, are willing and able to protect species like the grizzly bear, the wolf, sage-grouse, black-footed ferret, and other species that are within their counties?

Mr. BOUSMAN. Congresswoman Lummis, definitely the conservation ethic has changed at the local level. And, in my experience in

Wyoming, for example, the local people now look to us, as their elected officials, to take into account those sorts of things, which 20 years ago you would have never seen a county commissioner at a hearing in Washington, D.C., talking about these kinds of issues. The mindset has changed.

And we are in a position now, both willing and ready, to work with our State game management agencies to point out at the local level what the problems are. An example could be—and we have one in our county—mule deer migration and bottlenecks that have occurred that inhibits the mule deer from migrating from one place to another where they spend the winter, getting back in the summer. And we're ready and engaged in addressing those issues.

And if we could somehow redirect a little bit the Fish and Wildlife Service to become more of a resource for State and local governments to say how can we help you meet the goals, the conservation goals of a species, we could be much more effective on the ground.

Mrs. LUMMIS. I commend to the panel's attention a drive between Pinedale, Wyoming, and Jackson, Wyoming, where there have been overpasses created over a road for antelope and underpasses for elk and deer because the species choose different means of access across the highways. The antelope won't go under an underpass, whereas elk and deer will. And so two massive overpasses were built specifically for antelope to cross that road, thereby saving tremendous wildlife deaths on the highway.

So I commend, Mr. Bousman, your county and your particular involvement in these issues.

Ms. BUDD-FALEN, a comment was made about Wyoming's wolf recovery plan and its adequacy. Would you care to comment on the wolf case?

Ms. BUDD-FALEN. I think the most frustrating thing about the wolf case for the people in Wyoming was the fact that that case got litigated in Washington, D.C., rather than in Wyoming with a Wyoming Federal district judge who knew the people, who knew the land, who knew the State.

In fact, there was litigation in both Wyoming and Washington, D.C., and the case got moved over to Washington, D.C., to a judge who I don't think has any idea where Wyoming is, which one of the square States we are. That was one of the first problems.

I think the second problem is that, after the wolf case got sent back to Wyoming because they didn't have a commitment, a written commitment from the Governor, the legislature and the Game and Fish immediately acted to put in that true, written commitment on wolf recovery in place, but the case was over, the court wouldn't recognize it, and then the U.S. Fish and Wildlife Service refused to recognize it. So Wyoming tried to fix the problem identified by the court, and it didn't help.

Mrs. LUMMIS. My time has almost expired, so I will yield to the ranking member, Mrs. Lawrence, for 4 minutes.

Mrs. LAWRENCE. I appreciate my chairman's lesson on antelope and elk. I had no idea, so I learned something today.

Mr. GLICKSMAN, let's discuss the consequences that budget cuts have had. Would you—let's talk about this. Do you agree that a lot of the litigation is due to an agency's missed deadlines?

Mr. GLICKSMAN. Yes.

Mrs. LAWRENCE. So the Fish and Wildlife Service uses innovative programs, but they're understaffed and underfunded and they struggle to manage it. It's not surprising, when funding cuts are made, you have an issue with missing deadlines, and plaintiffs sue the agency.

What do you recommend or what would you say to Congress as we talk about this, as we talk about the need to ensure that our sincere efforts to protect the endangered species—that, one hand, because they're cutting the costs and staffing of that agency and litigation is increasing—and I agree with the comment that was made, we need more scientists and less litigation.

But can you comment on that? Enlighten us.

Mr. GLICKSMAN. I would say that, to me, it seems counterintuitive to redress a research shortage by cutting funds still further. If the agency lacks sufficient funds to comply with the statutory responsibilities, the solution, it appears to me, would be to provide more funding and more staff.

In recent years, the agency has experienced about a 10-percent decline in the levels of staffing, which obviously would make it more difficult for it to comply with its obligation to respond to petitions of all sorts on a timely basis.

It would also, I think, increase the likelihood that, when the agency does make a decision, it's not going to be as thorough, well-considered, or take into account all perspectives that ought to be taken into account. And it may be that the lack of funding is responsible for failure to consult and work rigorously with all affected interests. They just don't have the time, the personnel, or the money to do so.

Mrs. LAWRENCE. I thank you.

And, Madam Chair, I just wanted to close with, when we have an objective in a bipartisan act and we want to be able to use the full entirety of it, that we must look at the staffing that we have. And lack of funding leads to lawsuits. It also makes it difficult to keep species off the endangered species list, and it hampers the ability of the Fish and Wildlife to adequately oversee the recovery, which is ultimately the real barrier to delisting.

And I yield back.

Mrs. LUMMIS. I thank the ranking member for her time and her participation in this hearing.

The chair now recognizes the gentleman from Arkansas, Mr. Palmer, for 4 minutes.

Mr. PALMER. Madam Chairman, if I may, I'd like to correct the record that I'm from Alabama.

Mrs. LUMMIS. Excuse me.

Mr. PALMER. That's all right. Bruce Westerman would've been proud of it.

Mr. Thornton, you were counsel to the House Fisheries and Wildlife Conservation Subcommittee during the congressional consideration of the 1978 and 1979 Endangered Species Act. As such, you have familiarity with the background and legislative intent of these amendments and their provisions.

What is your understanding of the reason for that part of the law that creates the distinct population segments, or DPS?

Mr. THORNTON. So, Congressman, some of the problems you might be able to blame on me, perhaps, but——

Mr. PALMER. We're not blaming anyone.

Mr. THORNTON. But it's very interesting because the distinct population segment question was controversial at the time, and I think there was a recognition that there was a potential for abuse of listing of distinct populations and the inability to properly define what's a distinct population.

Just, if you'll bear with me, a little story. In the course of the testimony during the oversight hearings in 1979, the Fish and Wildlife Service was responding to the complaints about the ability to list distinct population segments, and they cited as an example of why they needed population authority was their down-listing of the American alligator in the southern parishes of Louisiana.

That was near and dear to the then-chair of the subcommittee, Congressman John Breaux, who represented southwest Louisiana and had worked for a number of years to, A, have the State implement a management program that was phenomenally successful in increasing the populations of alligators and then subsequently reducing the regulations.

And, frankly, it was the case that they made to Congressman Breaux, that we need this authority to give us more flexibility in the statute to remove those populations from the list when they recover, when they're not threatened——

Mr. PALMER. But that hasn't been the case, has it?

Mr. THORNTON. No. In fact, unfortunately, it's worked just the opposite, where the DPS authority is now used as a barrier.

Mr. PALMER. You mentioned the possibility of it being abused. Do you believe it's been abused?

Mr. THORNTON. I do think that, in general, the barriers that have been created by a listing of distinct population segments, which has increased, and now, in some of the litigation that's occurred, the inability to delist component parts of a broader listed species, a subspecies or a species where it's recognized that there are individual populations that have recovered. The courts have made it more difficult to delist those individual segments.

Mr. PALMER. Okay.

Mr. Baier, you had a slide up during your opening remarks. Could you please explain the second graphic exhibit in your written statement regarding the delisting attempts for the wolves and grizzly bears, all of which, it seems, the courts have overturned and reversed?

Mr. BAIER. Yes. Thank you, Mr. Palmer.

If you all will get that graphic in front of you, if we can put it up.

The vagueness of the language in ESA surrounding distinct population segments, a significant portion of a species range, or the adequacy of existing regulatory mechanisms to manage a species once recovered are the three areas, the three sets of language in the act which has led to the inability to delist the wolf, both in the Great Lakes and northern Rocky Mountains, and pretends to do so with the Yellowstone grizzly.

What this graph does is, serially, by year, walk down through for each of the species the delisting or down-listing of the species by

the Service and then, under each of those, shows the delisting being reversed by a court.

And at the bottom you'll see, "Key to the grounds for reversal." There's three different grounds down there—1, 2, and 3. And so, in this graph, you'll see in parens under each reversal either a 1, 2, or a 3, and those show the specific language upon which the court's decision turned to delisting.

I wish we would've put these court decisions in red, but that's what this graph shows, is that, because of the vagueness of the language itself, each of these cases has turned on one of three.

Mr. PALMER. I'd just like to point out that, in regard to the distinct population segments, it was used seven times.

I yield back.

Mrs. LUMMIS. I thank the gentleman and recognize the arrival of our vice chair, the gentleman from Colorado, Mr. Buck, who will be recognized for 5 minutes due to the fact that he missed the first round.

Mr. Buck, you are recognized for 5 minutes.

Mr. BUCK. Thank you, Madam Chair.

Ms. BUDD-FALEN, I had the pleasure of practicing law in Cheyenne for a short period of time. And I remember a saying, actually probably more outside the bar than inside the bar, but: If there's one lawyer in town, the lawyer starves; if there are two lawyers in town, both lawyers become very wealthy.

I'm trying to figure out the attorneys' fees with the Endangered Species Act and what the legal basis for those attorneys' fees are.

Ms. BUDD-FALEN. The Endangered Species Act is actually paid out under a provision in the ESA itself, which means that the fees for that act are paid from the judgment fund, not from the Equal Access to Justice Act.

The judgment fund allows payment for achieving part of the goal of the litigation, whatever part of that goal might be. So even if the goal is simply, "Fish and Wildlife Service, you missed a time deadline," that is achieving the goal of the litigation, you get paid your attorneys' fees.

There is no cap on the hourly fee that you charge under the judgment fund, so \$500 an hour or \$700 or whatever. They don't pay Cheyenne attorneys that, but whatever the attorneys' fees paid are, that gets paid.

I pulled the Department of Justice run sheets from 2010 to 2015 just for Endangered Species Act cases alone and found that over \$9 million was paid in attorneys' fees from 2010 to 2015 for ESA cases solely.

Mr. BUCK. And so how much did the Department of Justice recover from plaintiff's attorneys that filed frivolous lawsuits?

Ms. BUDD-FALEN. None. There is no fee shifting in the opposite direction. So if I lose a case against the Justice Department, I don't have to pay.

Mr. BUCK. One of the beauties of Wyoming is this common sense. Does that encourage or discourage people from filing lawsuits, when they get money if any small part of their suit is successful but they don't have to risk anything if they are deemed to have filed a frivolous lawsuit?

Ms. BUDD-FALEN. Quite honestly, Mr. Buck, I think that there is no downside to filing this kind of litigation. I have seen these attorneys' fees cases and these ESA cases brought by students of Denver University Law School. We have seen these brought by, "non-profit organizations." The attorneys' fees go strictly back into them.

The vast majority of attorneys' fees we found is done through a settlement agreement, so we have no idea, as the American public, the hours charged for a particular task in the litigation or the hourly fee charged by the attorney.

Mr. BUCK. And what is the effect on the administration of the Endangered Species Act or the administration generally in government when individuals file lawsuits? Does it prolong the study or effort to move forward on certain issues?

Ms. BUDD-FALEN. Yesterday at the hearing, Director Ashe talked about how litigation wasn't even a consideration. He is not getting that from his staff. The staff people on the ground will absolutely tell you that they spend so much time preparing for litigation, responding to Freedom of Information Act requests, that they simply cannot do their job because all of their hours are sucked up in litigation.

So it may not be a policy at the top, but it is killing the regular Fish and Wildlife Service or Bureau of Land Management or Forest Service people at the bottom of the totem pole.

Mr. BUCK. And the effect is really twofold. On the one hand, where a species should be delisted it would take much longer, and where a species may need to be listed, at the same time, those individuals that are burdened with paperwork don't have the ability to go out and do their job.

Ms. BUDD-FALEN. That's correct. They don't have time to go do the science and gather up the information so that they can figure out if something needs to get off the list, or so that they can set a recovery bar so that States and landowners can work toward goals to get it off the list.

Mr. BUCK. I appreciate your testimony.

I yield back.

Mrs. LUMMIS. Now I wish to ask each member of our panel to use 1 minute each to say anything that they wish they could have said but was not asked of them.

Mr. Baier, thank you for your testimony. You are recognized for 1 minute if you wish to use it.

Mr. BAIER. Thank you, Madam Chairman.

I wish Mr. Zinke were still here. I checked my record. He asked me how much—Mr. Buck—how much was spent on payments each year, what are these lawsuits costing us as taxpayers. And I said it was over a million. I was having trouble remembering. It's about \$49 million. For fiscal years 2009 and 2010, we went back and checked the records, and the average is about \$49 million for those 2 years.

We need to have an open book. I have had to do the research, Karen Budd-Falen has had to go back and do the individual research to find out how much is being paid out.

And thank God, in the energy bill, the Equal Access to Justice Act reform measure that Chairwoman Lummis has been a champion of in the House has finally passed, and now it's in the energy

bill, which I understand was finally passed. So we are going to get an open book, finally, so we can keep track of this.

Thank you, Madam Chair.

Mrs. LUMMIS. I thank the gentleman.

Mr. BAIER. And thank you for your championing this for 6 years. It's taken 6 years to get that open book finally passed.

Mrs. LUMMIS. I commend also to those in attendance Mr. Baier's book, which is sitting on the dais, or on the table next to him. It's exhaustive research and factual information on the Equal Access to Justice Act.

Mr. Thornton, you are recognized for 1 minute.

Mr. THORNTON. Madam Chair, I think what I would like to add, that I think it's very important that Congress focus on the issue of what constitutes best science. That was added to the statute when I was counsel to the committee in 1978. The thought was that it established a higher standard for the Fish and Wildlife Service to meet. Frankly, that has not worked out in practice, and we get into the problem of the agency relying on the defense, "Well, these are technical issues, and therefore you have to defer to the agency."

I think there has to be some standard of what constitutes best science. One element that I spoke about in my testimony is transparency. It seems to me that should be noncontroversial, that there should not be hiding the data, that you shouldn't have to file lawsuits, as I've had to do, just in order to obtain the data, which we had to do in the gnatcatcher. You shouldn't have to have the agency hiding behind the so-called deliberative process exemption in the Freedom of Information Act and refuse to provide information that is, after all, facts that's in possession of the agency or in possession of the agency's consultants.

And then an understanding that best science means that the agencies are obliged to use what is the current standard in the profession and, frankly, not rely simply on what might have been perfectly adequate science in 1920 but is no longer.

Mrs. LUMMIS. I thank the gentleman for his specific recommendations about how to improve the implementation of the act.

Mr. Bousman, you are recognized for 1 minute.

Mr. BOUSMAN. Thank you, Madam Chairman.

One thing that comes to my mind, to give an example, an on-the-ground example of how local government participating with a Federal agency can actually improve the outcome of a process and decrease the prospects of litigation, the Forest Service 3 or 4 years ago started an analysis in the Hams Fork area in northern Lincoln County. They wanted to do a timber management project.

And up until that time, every time the Forest Service seemed to propose cutting trees that might create jobs and thin the forest and reduce the cost of fire suppression, it got litigated. In this case, with the help from the county's involvement and the Governor's office involvement, working with the Forest Service in a collaborative effort, bringing in representatives from local environmental groups whose national group tends to litigate—by involving that local component in a collaborative effort up front in developing this forest management plan, that record of decision on the Hams Fork was not litigated at all. The record of decision stood as it was proposed.

And now we're in the process of actually putting out—letting people bid on projects to harvest trees, make the forest a healthier forest for all the multiple uses that use that forest. And it's a win-win for everybody. But it required the in-depth participation at the local level to make that happen.

Mrs. LUMMIS. I thank the gentleman and commend you on your leadership on these issues.

Mr. Glicksman, you are recognized for 1 minute.

Mr. GLICKSMAN. Thank you.

I would like to point out first that there are costs to the filing of frivolous lawsuits under the ESA and elsewhere. There's a reputational cost to an attorney in a case in which a judge says that the suit was frivolous. There are sanctions available in the Federal Rules of Civil Procedure for bringing frivolous lawsuits, although they're not often exercised. And attorneys' fees are not going to be reimbursed if the plaintiff loses.

But I wanted to end by pointing out that I think there's common ground between me and at least some of the points of each of my co-panelists.

So I would agree, for example, that the ultimate goal of the statute ought to be protection of ecosystems, not protection of individual species alone.

I wouldn't necessarily agree that we need fewer lawyers. As a law professor, that would be against my self-interest. But I do agree that we need more scientists, especially at the Fish and Wildlife Service.

I agree that a recovery plan should have clear metrics that indicate when we have met recovery goals.

I agree that policy-based decisions in natural resources management are often best when they're a result of collaboration among and decisions that are acceptable by all levels of government. So I do encourage collaboration between the Fish and Wildlife Service and lower levels of government.

And, finally, I think that one advantage of authorizing Federal action is its capacity to act as a resource pooler. And so the idea of the Fish and Wildlife Service providing needed information to allow local governments to act in ways that are beneficial to species while protecting economic interests is an attractive one to me.

Thank you.

Mrs. LUMMIS. Well, I thank you, Mr. Glicksman. And we are seeking common ground, and I believe we've found some today. Thank you for your testimony.

Ms. Budd-Falen, you are recognized for 1 minute.

Ms. BUDD-FALEN. Thank you, Congresswoman.

I think that I would agree with my panelists that one of the biggest problems we have now is that, often, we don't have goals for how many species we need or what kind of habitat we need. Species get put on the list without clear goals, without clear recovery, and then States and private landowners simply can't manage to what they don't know to manage for.

I think that if the Fish and Wildlife Service truly wants to recover species, they need to tell us what they want or let the States and local governments figure out what they want so that they can

manage for it. It's impossible to manage for something if you don't have a goal.

I do think, though, that it's a little sort of disingenuous to say, oh, States can just keep species off the list if they just manage better for the species. The problem is you've got all the litigation. And so, even if the species, for example in the lesser prairie chicken case, is putting together a range-wide plan covering five different States and 5.8 million acres, the Center for Biological Diversity sued anyway. And the Fish and Wildlife Service said the range-wide plan doesn't have a chance to work, we are not going to wait for all the CCAAs in place, we're listing it anyway.

And then we just went through 2 years of litigation where the court finally said, Fish and Wildlife Service, you didn't give the range-wide plan a chance to work, and so the listing got vacated. Fish and Wildlife Service has to determine if they're going to appeal that to the Fifth Circuit Court of Appeals. I think their timeline is, like, another 10 days to appeal it or not.

So that was a case where you had five States trying to do the right thing and it got preempted by litigation. The species ought to matter, not the litigation, and I'm afraid that's the way it works now.

Thank you.

Mrs. LUMMIS. Well, this panel has exhibited great expertise and an effort to find common ground to recover species. And that's what we're after. And we are deeply grateful to each one of you, who has traveled far to offer up and share your expertise.

I'm hopeful that your wise admonitions and advice will change the way the Endangered Species Act is used in the future so species recovery is paramount to other considerations, as I believe the people who envisioned the Endangered Species Act in 1973 envisioned.

So, with that, I would like to thank our witnesses for taking the time to appear before us today. And if there is no further business, without objection, the subcommittee stands adjourned.

[Whereupon, at 2:43 p.m., the subcommittee was adjourned.]

